(1)
SUPREME COURT, U.S.
FILED
00-617 OCT 16 2000
OFFICE OF THE CLERK

No. 00-

IN THE

Supreme Court of the United States

INTERNATIONAL AIRCRAFT RECOVERY, LLC,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DAVID PAUL HORAN
Counsel of Record
EDWARD W. HORAN
HORAN, HORAN & WALLACE, LLP
Attorneys for Petitioner
608 Whitehead Street
Key West, Florida 33040-6549
(305) 294-4585

162859

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

107pp

QUESTIONS PRESENTED

When, in an *In Rem* salvage action, does adjudication of ownership become necessary?

When adjudication of ownership becomes necessary, what uniform standard of "abandonment" must admiralty courts apply?

PARTIES TO THE PROCEEDING

The Petitioner/Salvor is International Aircraft Recovery, LLC, a Nevada Limited Liability Company whose managing member is Historic Aircraft Recovery, Inc., a closely held Nevada corporation. Neither International Aircraft Recovery, LLC, nor Historic Aircraft Recovery, Inc., are part of any conglomerate, they have no parent corporation, and are not a subsidiary of affiliate of any identifiable legal entity. International Aircraft Recovery, LLC was formed specifically for the purpose of recovery of the *In Rem* Defendant (aircraft) in the proceedings below. No parent, or publicly held company owns ten (10%) percent or more of International Aircraft Recovery, LLC or Historic Aircraft Recovery, Inc.

The Respondent (Intervening Claimant Below) is the United States of America.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Cited Authorities	v
Table of Appendices	viii
Opinions Below	1
Statement of Jurisdiction	1
Constitutional Provisions	1
Statement of the Case	2
Reasons for Granting the Writ	7
I. The Decision Of The Court Of Appeals Provides "Sovereign Immunity" From The Admiralty Court's *In Rem* Jurisdiction *Regardless* Of The Sovereigns Knowledge Of The *Existence* Of The *In Rem* Defendant, Much Less Its "Possession".	7
II. This Court Must "Abandon" The Confusion In The Circuits.	15

Contents

Page

III. The Application Of An Express Abandonment Standard Results In A "Death Penalty" For *In Rem* Defendants Recognized Under The Laws Of Admiralty. 21

IV. The Death Of The Abandoned Shipwrecked Act. 24

Conclusion 27

TABLE OF CITED AUTHORITIES

Page

Cases:

Anderson v. Bessemer City, 470 U.S. 564 (1985) .. 19

California v. Deep Sea Research, Inc., 523 U.S. 491 (1998) ..... *passim*

Cobb Coin Co., Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel, 525 F. Supp 186 (S.D. Fla. 1981) 13

Columbus-American Discovery Group, Inc. v. Atlantic Mut. Ins. Co., 203 F.3d 291 (4th Cir. 2000), Petition for Cert. filed, 68 U.S.L.W. 3757 (U.S. June 13th, 2000) 15

Deep Sea Research, Inc. v. The Brother Jonathan, 883 F. Supp. 1343 (N.D. Cal. 1995), 102 F.3d 379 (9th Cir. 1996) 7

Florida Dept. of State v. Treasure Salvors, Inc., 458 U.S. 670, 102 S. Ct. 3304, 73 L. Ed. 2d 1057 (1982) 17, 21, 22

Henner v. The United States, 525 F. Supp. 350 (S.D.N.Y. 1981) 16

Legnos v. M/V Olga Jacob, 498 F. Supp. 666 (5th Cir. 1974) 16

Cited Authorities

Page

MDM Salvage, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 631 F. Supp. 308 (S.D. Fla. 1986) 13

Ralli v. Troop, 157 U.S. 386, 403 15 S. Ct. 657, 39 L. Ed. 742 (1894) 21

Sea Hunt, Inc. v. The Unidentified, Shipwrecked Vessel or Vessels, 47 F. Supp. 2d 678 (E.D. Va. 1999), 221 F.3d 634 (4th Cir. 2000) 12, 13, 14, 15, 24, 25, 26

"*The Davis*", 10 Wall. 15, 19 L. Ed. 875, 77 U.S. 15 (1869) 19, 22, 24

"*The Lottowanna*", 21 Wall. 558, 575, 22 L. Ed. 654 (1875) 18

"*The Siren*", 74 U.S. 152 (1868) 22

Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel, 569 F.2d 330 (5th Cir. 1978) 26

Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel, (Treasure Salvors III), 640 F.2d 560 (5th Cir. 1981) 9, 10, 13, 16

United States v. California, 332 U.S. 19 (1947) ... 19, 25

Cited Authorities

Page

United States v. Wilder, 3 Sumn. 308, 28 F. Cas. 601 (1838) 22, 23, 24

Yukon Recovery, LLC v. Ocean Mar, Inc., 205 F.3d 1189 (9th Cir. 2000), Petition for Cert. filed, 68 U.S.L.W. 3774 (U.S. June 20th, 2000) 15

Statutes:

28 U.S.C. § 1254(1) 1

Abandoned Shipwreck Act of 1987 (ASA), 102 Stat. 432, 43 U.S.C. § 2101-§ 2106 ..... 7, 24, 25, 26

United States Constitution:

U.S. Const., Art. III, § 2 16

U.S. Const., Art. III, § 2, Cl. 1 1

U.S. Const., Art. IV, § 3, Cl. 2 ..... 1, 19, 25

U.S. Const., Art. IV, § 3, Cl. 2 ..... 1, 19

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Eleventh Circuit Dated July 17, 2000 ..... 1a

Appendix B — Opinion Of The United States District Court For The Southern District Of Florida Dated July 8, 1999 ..... 20a

Appendix C — Opinion Of The United States Court Of Appeals For The Fourth Circuit In *Sea Hunt, Incorporated v. The Unidentified Shipwrecked Vessel Of Vessels*, Nos. 99-2053 and 99-2036 Dated And Decided July 21, 2000 ..... 44a

The Petitioner/Salvor International Aircraft Recovery, LLC, respectfully petitions for a writ of certiorari to review the Judgment of the Eleventh Circuit Court of Appeals.

OPINIONS BELOW

The opinion of the Eleventh Circuit (App. A) is reported at *International Aircraft Recovery, LLC v. Unidentified Wrecked and Abandoned Aircraft, et al.*, 218 F.3d 1255 (11th Cir. 2000). The District Court opinion (App. B) is reported at *International Aircraft Recovery, LLC v. Unidentified Wrecked and Abandoned Aircraft, et al.*, 54 F. Supp. 2d 1172 (S.D. Fla. 1999).

STATEMENT OF JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was entered July 17th, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Constitution of the United States, Article III, Section 2, Clause 1; "JURISDICTION OF COURTS", provides: "The judicial Power shall extend to all Cases . . . of admiralty and maritime Jurisdiction . . ."

The Constitution of the United States, Article IV, Section 3, Clause 2; "PUBLIC LANDS", provides: "The Congress shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States: and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."

STATEMENT OF THE CASE

In 1990, a group of salvors, searching for Spanish galleons, located the wrecksite of an aircraft in deep international waters approximately eight (8) miles east of Miami, Florida. After reviewing the video tape of the remains of the aircraft, the salvors determined that it was, more than likely, a Naval aircraft and they offered to sell the video tape and location to the Navy through the Navy's "National Museum of Naval Aviation" in Pensacola, Florida. The Navy determined that the aircraft was a TBD-1 "Devastator" Torpedo Bomber. The Navy also determined that this was the only TBD-1 aircraft that was then known to exist. All other TBD-1 aircraft had been lost, abandoned, destroyed, etc. by the end of World War II.

When the Navy declined to purchase the location and video tape, (for the total sum of $25,000) the discoverers were referred to Douglas Champlin, a private collector and restorer of *Fighter* Aircraft. Because it was a "Bomber", Champlin was not interested in recovering the rare TBD-1 for himself, but he believed that the aircraft belonged on display at the National Museum of Naval Aviation. For the next five (5) years, Champlin attempted to work out an agreement with the National Museum of Naval Aviation to recover the aircraft for the museum. The Navy, unable to ascertain whether the recovery could be successful (due to the unknown structural integrity of the wreckage), requested additional information.

During the negotiations, the Navy informed Champlin of the possible interest of third parties in the recovery and encouraged Champlin to protect the wrecksite. In August of 1994, Champlin filed an *In Rem* salvage action and a salvage

expedition was mobilized to recover a portion of the aircraft to ascertain its condition and provide another video to the Navy. The Navy needed these to assess the likelihood of a successful recovery/restoration. In March of 1995, the *In Rem* salvage action was dismissed at the request/insistence of the Navy and the portion of the TBD canopy that had been salvaged by Mr. Champlin, was delivered to the Navy's National Museum of Naval Aviation.

After an additional three and one-half years of unsuccessful negotiations with the Navy, Champlin formed International Aircraft Recovery, LLC and in July 1998 filed his second *In Rem* salvage action. The *In Rem* salvage action sought either a full and liberal salvage award, or, if the court determined the aircraft to have been abandoned, an alternative request was made for an award of title under the "American Law of Finds". A second salvage expedition was launched and the TBD-1's radio mast was salvaged and another video of the wrecksite was made. In late December, 1998, the United States (Navy) moved to intervene in the *In Rem* salvage action and sought to vacate the prior court orders pertaining to the *In Rem* Arrest. The United States also sought to enjoin the Plaintiff/Salvor INTERNATIONAL AIRCRAFT RECOVERY, LLC, from conducting further salvage operations. In early 1999, the *In Rem* Warrant of Arrest Warrant was executed against the radio mast salvaged from the *In Rem* Defendant aircraft and INTERNATIONAL AIRCRAFT RECOVERY, LLC stipulated to the intervention by the United States. The United States then entered its claim as "owner of the Defendant aircraft and contents". Discovery proceeded and depositions were taken of Dr. William Dudley, the Director of Naval History and Director of the Naval Historical Center in Washington D.C., the Director, Deputy Director and Curator of the National Museum of Naval

Aviation in Pensacola Florida and the representative of the Plaintiff/Salvor Douglas Champlin. After the depositions, Cross-Motions for Summary Judgment were filed and an evidentiary hearing was set by the trial court's Judge James Lawrence King. During the June 4th, 1999 hearing, there was testimony of witnesses and exhibits entered into evidence, along with the depositions of the parties. By the end of the June 4th hearing, it became clear to the parties (and to Judge King) that there were no remaining factual disputes between the Plaintiff/Salvor and the Intervening Claimant. On June 14th, 1999, the court heard final legal argument on the Cross-Motions for Summary Judgment.

The Intervenor United States (Navy) admitted that since the loss of the TBD-1 on July 1, 1943, it had not been in *possession or control* of the *In Rem* Defendant aircraft. The Intervenor asserted that it retained "ownership" and had not "abandoned" the aircraft, and therefore, could reject all salvage efforts.

Judge King's July 8th, 1999 Order, granting the Plaintiff/ Salvor's Summary Judgment, reasoned that, "The issue of abandonment and ownership are secondary to the question of whether this court can protect the Plaintiff's ongoing federal salvage rights as to the *In Rem* Defendant aircraft." Judge King's Order referred to the undisputed testimony of the Director of Naval History and the Naval Historical Center, and the Director of the National Museum of Naval Aviation that the United States has no funding to mount any timely effort to save the *In Rem* Defendant or even the ability to trade government owned equipment in return for salvage services. Judge King found that, since the loss of the aircraft on July 1st, 1943 (and the September 8th, 1943 marking of the aircraft as "STRICKEN"), the Intervenor United States

had abandoned any hope or expectation of ever recovering the aircraft. The location of the *In Rem* Defendant was unknown until 1990 and, as the admiralty court put it, "She was lost to a watery grave."

The Intervenor, United States, claiming ownership and lack of any evidence of abandonment, admitted knowing of the existence of the aircraft for ten (10) years yet, during that time being unable (or unwilling) to rescue the *In Rem* Defendant from it's maritime peril. Judge King found the *In Rem* Defendant to be in maritime peril and in danger of being lost forever. Judge King found that the Plaintiff's salvage services were voluntary, successful (up to that point) and that the Plaintiff/Salvor had a valid maritime lien against the *In Rem* Defendant aircraft. Judge King's decision relied upon the intervenors testimony that the Intervening Claimant has "no budget or funding for locating and recovering historic aircraft from a water environment" and that the experts "are unanimous in their opinion that TBD-1 BUNO #0353, located in deep international waters east of Miami Beach is one of the rarest and most historic military aircraft still in existence."

Although the trial court's Opinion discussed the Intervenor's "ownership" claim and the salvor's "abandonment" defense, the court declined to rule on whether the Intervening Claimant United States was the "owner" holding that: "Even were the Court to hold that the Intervenor United States was the owner (which it does not) the Plaintiff would continue to have an ongoing right to finish providing the salvage services which they have already started."

Because the Intervening Claimant was admittedly unable to mount a timely salvage expedition to recover the *In Rem* Defendant, Judge King held that the Plaintiff/Salvor was allowed to continue the salvage services "so that the abandoned derelict aircraft can be salvaged, preserved and restored and displayed to the American public as the only surviving example of a rare and equally historic aircraft." Finally, Judge King allowed the Intervenor United States (Navy) to claim ownership after recovery of the TBD-1 because "the Plaintiff/Salvor and Intervenor agree that recovery and display of this aircraft is essential to the preservation of the peoples heritage".

The Intervenor United States appealed the District Court decision and moved for an emergency stay. The emergency stay was denied by the trial court, but granted by the Eleventh Circuit.

The Eleventh Circuit's July 17th, 2000 Opinion did not take issue with *any* of the trial court's factual findings. The Eleventh Circuit found that Judge King erred in failing to address the "ownership" issue prior to allowing salvage to proceed and then went on to find that the Intervenor United States was the owner of the *In Rem* Defendant and that it would take "an affirmative act authorized by Congress" to abandon the aircraft. The Eleventh Circuit Opinion stated: "We reject the District Court's reasoning and instead interpret the Law of Salvage to permit the owner of a vessel in marine peril to decline the assistance of others so long as only the owners property interests are at stake". The Eleventh Circuit remanded the case to the admiralty (trial) court for consideration of a possible salvage award as to salvage services previously advanced by International Aircraft Recovery, LLC and its predecessor's in interest.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS PROVIDES "SOVEREIGN IMMUNITY" FROM THE ADMIRALTY COURT'S *IN REM* JURISDICTION *REGARDLESS* OF THE SOVEREIGNS KNOWLEDGE OF THE *EXISTENCE* OF THE *IN REM* DEFENDANT, MUCH LESS ITS "POSSESSION".

The admiralty courts underlying procedure in this court's unanimous opinion in *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998), should be our national standard for voluntary *In Rem* salvage actions. The admiralty/trial court took jurisdiction of the *In Rem* Defendant by appointing the salvor as the court's substitute custodian. *Deep Sea Research, Inc. v. The Brother Jonathan*, 883 F. Supp. 1343, 1360-61 (N.D. Cal. 1995). The trial court refused, at that time, to decide the question of ownership finding that, "DSR [the salvor] has suggested that any final determination regarding title should be made after the salvage operation is completed. The Court agrees that this is the most prudent way to proceed with the case at this time." *Id.* at 1354. As the salvage continued, the Ninth Circuit affirmed the admiralty court's orders and allowed the salvage to proceed. *Deep Sea Research, Inc. v. The Brother Jonathan*, 102 F.3d 379, 389 (9th Cir. 1996). Thereafter, this Court granted certiorari to address the State of California's claim of immunity from the admiralty court's *In Rem* salvage jurisdiction. This Court also granted certiorari to consider the related questions as to whether the *In Rem* Defendant was subject to the Abandoned Shipwreck Act of 1987 (ASA), and whether the ASA preempted the California Statute

vesting title in the state to all abandoned shipwrecks within state waters. Despite having granted certiorari on all of these issues, it was the unanimous opinion of this Court that it should restrict its ruling only to the issue of the claimed immunity from the admiralty court's *In Rem* jurisdiction. This Court unanimously upheld the portion of the judgment of the Court of Appeals affirming the federal admiralty court's exclusive *In Rem* salvage jurisdiction. The judgment in all other respects was vacated and the case remanded for further proceedings consistent with this Court's unanimous holding that the state, federal government, or foreign government may assert ownership of the *res*, but that "proceedings *In Rem* to enforce a lien against property of the United States are only forbidden in cases where, in order to sustain the proceeding, the possession [actual possession] of the United States must be invaded under process of the Court." *California v. Deep Sea Research*, 523 U.S. at 507. Judge King's decision in *International Aircraft Recovery LLC v. The Unidentified, Wrecked and Abandoned Aircraft*, (App. A) was in accordance with this Court's reasoning in *The Brother Jonathan* in that the Plaintiff/Salvors' *In Rem* maritime salvage lien against the *In Rem* Defendant aircraft could continue because the United States didn't even know where it was, much less have it in "actual possession".

The Eleventh Circuit's decision to stay the salvage operation and adjudicate the Intervenor's ownership claim (by appellate fact-finding) was the functional equivalent of granting the United States "sovereign immunity" from the *In Rem* maritime proceeding. The Eleventh Circuit's prohibition of the admiralty court's Constitutionally established jurisdiction to allow the salvage to continue did *not* "turn on the sovereign's possession of the *res* at issue." *California v. Deep Sea Research*, 523 U.S. at 507.

In any *In Rem* salvage action, a claim of "ownership" by an Intervenor can only be rebutted by the Plaintiff/Salvor's defense of "abandonment". To allow a sovereign Intervenor to assert ownership *and* require the salvor to show affirmative abandonment by a Congressionally authorized affirmative act [the absolutely highest "affirmative abandonment" standard] and *then* to allow a refusal of salvage services *is* a grant of sovereign immunity! To require, or even allow, an admiralty court to terminate ongoing successful salvage at the request of a sovereign intervenor claiming ownership, without any consideration of whether it is in the sovereigns "possession", is directly contrary to this Court's rationale in *Deep Sea Research. Id.* at 504-07. Justices Stevens, Kennedy, Ginsburg and Breyer, in their concurring Opinions, were convinced (by Justices Story and Washington) that this Court . . . "should have affirmed the Treasure Salvors judgment in it's entirety". *Id.* 523 U.S. at 510. In *Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel*, (*Treasure Salvors, III*), 640 F.2d 560, 567 (5th Cir. 1981), the Fifth Circuit stated:

> The salvor . . . has a valuable interest in his salvage operations which the law protects by vesting in the salvor certain rights. Among the most important of these rights are the right to exclude others from participating in the salvage operations, so long as the original salvor appears ready, willing and able to complete the salvage project, and the right to possession of the salved property, *a right exclusive even of the owner, until such time as the salvage lien on the property is extinguished or adequate security for this obligation is given*. Although the law of salvage grants the salvor a right to possession of the property, the salvage of a vessel or goods at sea,

> even when the goods have been abandoned, does not divest the original owner of title or grant ownership rights to the salvor, except in extraordinary cases[.]

(emphasis supplied)

At some point during the last nineteen years, many of our District and Circuit Courts have "forgotten" that an *In Rem* maritime salvage lien continues to be "*a right exclusive even of the owner*" until such time as the maritime lien is satisfied. Using land based "ownership law" and an "express abandonment" standard cannot be allowed in an admiralty setting. Justice Stevens, explaining his mistake in *Treasure Salvors*, concluded that his "reasoning would have been sound if we were deciding an ejectment action in which the right to possession of a parcel of real estate was in dispute." *California v. Deep Sea Research*, 523 U.S. at 510. This Court *must* set a clear national standard that ownership, without actual possession, is secondary to a maritime salvage lien.

This Court's unanimous Opinion in *Deep Sea Research* sought to "clarify" a very important point: That the *In Rem* salvage jurisdiction of a trial court is based entirely on the *admiralty court's possession* of the *In Rem* Defendant (*i.e.*, the property in dispute). *Id.* 523 U.S. at 507. In Section II of this Court's unanimous opinion, two cases, both decided in 1809, were quoted for the proposition that the admiralty court's *In Rem* jurisdiction is to be exercised whether or not intervention is sought under a claim of immunity/ownership. *Id.* 523 U.S at 502. This Court must make it perfectly clear that state, federal and foreign intervenors must recognize the admiralty court's *In Rem* jurisdiction and make their ownership claims accordingly. In *Deep Sea Research*, this

Court pointed out that it is when salvage has been successful (in whole or in part) that the admiralty court:

> decides in whom the right is and distributes the proceeds accordingly. In such a case, the court need not depend upon the goodwill of the state claiming an interest in the thing to enable it to execute its decree. All the world are parties to such a suit and of course are bound by its sentence. (quoting Justice Washington). *Deep Sea Research*, 523 U.S. at 502, 503.

Sovereign immunity principles applicable to the states, the federal government and foreign governments turn on the issue of whether the sovereign's *actual possession* of the *res* must be invaded under process of the court. Ownership becomes a factor when the federal admiralty courts adjudicate the respective claims of the intervenors and distributes the salvage proceeds accordingly.

Section III of the court's unanimous Opinion in *Deep Sea Research* occupied less than a page with the court concluding that,

> Because the record before this Court is limited to the preliminary issues before the District Court, we decline to resolve whether the Brother Jonathan is abandoned within the meaning of the ASA. We leave that issue for reconsideration on remand, with the clarification that the meaning of "abandoned" under the ASA conforms with its meaning under admiralty law. 523 U.S. at 508.

This Court's two and a half year old unanimous Opinion made the mistake of "assuming" that the admiralty courts of

this nation knew the meaning of "abandoned" under admiralty law and when, in an *In Rem* proceeding, the salvors' affirmative defense of "abandonment" must be adjudicated in response to an Intervening Claimant's assertion of "ownership". The Circuits are in conflict as to *when* the adjudication of ownership becomes necessary and they are *hopelessly* confused as to what uniform standard of "abandonment" the admiralty courts must apply.

In salvage actions involving intervention and ownership claims by the federal or a foreign government the conflicts and confusion of the Circuits become most apparent. In no case is the confusion of the Circuit Courts more evident than in the Eleventh Circuit's July 17th, 2000 decision, (App. A) and in the Fourth Circuit's July 21st, 2000 decision in *Sea Hunt, Inc. v. The Unidentified, Shipwrecks Vessel or Vessels*, 221 F.3d 634 (4th Cir. 2000). (App. C). Both cases are *In Rem* salvage actions. Both cases concern *In Rem* Defendants, the location (and existence) of which had been lost and/or forgotten by the original owners. Both cases concern intervening claims of ownership by a sovereign nation and "abandonment" defenses based upon the . . . "meaning of abandoned under admiralty law". *Deep Sea Research*, 523 U.S. at 508. Both cases concern an *In Rem* action where the sovereign nation makes no claim of prior knowledge of the location, much less actual possession of the *res*. In both cases, the Circuit Courts addressed the maritime salvage liens as *secondary* to ownership while forbidding the rescue of the *In Rem* Defendants from their maritime peril. In both cases, it is an *undeniable* fact that the maritime peril will ultimately destroy the historical and archaeological value of the *res*, not only to the salvor, but the citizens of the sovereign nations and the world. In both cases, the Circuit Court Opinions

terminated ongoing salvage that had already proved to be successful. In *International Aircraft* the circuit court denied further salvage explaining that it would not consider the fact that the conditions of the *in rem* defendant was . . . "deteriorating and time for recovering the plane is running short. . . . Because it does not implicate any rights or legally cognizable interests . . . beyond that or the United States in its own property . . . that could affect our interpretation of the law salvage." App. A at 17a. In *Sea Hunt*, the Circuit Court denied the salvor's maritime lien, explaining that, "It is the right of the owner of any vessel to refuse unwanted salvage. Sea Hunt knew before bringing this action that the Juno was a Spanish ship and *that Spain might make a claim* of ownership and decline salvage." (emphasis supplied) App. C at 70a.

This Court, in its unanimous Opinion in *Deep Sea Research*, never questioned the procedural issue of whether the rescue of an *In Rem* Defendant in maritime peril should proceed so that when ownership/abandonment etc. is adjudicated the proceeds of the salvage can be distributed. The confusion within the Circuits is *when* to recognize and protect a salvors' maritime lien. A salvor's maritime lien covers not only what has already been salvaged, but the providing of future salvage services until such time as the *In Rem* Defendant has been removed from its maritime peril. *Treasure Salvors, III*, 640 F.2d at 568-73; *MDM Salvage, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 631 F. Supp. 308, 312 (S.D. Fla. 1986); *Cobb Coin Co., Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 525 F. Supp 186, 204-05 (S.D. Fla. 1981). In *Deep Sea Research*, the trial court, the Ninth Circuit, and this Court allowed salvage to continue while the ownership claims by the intervenors [California *and* the federal government] and the salvor's "abandonment" defenses could be factually determined.

In *International Aircraft Recovery*, Judge James Lawrence King, one of the nations premier admiralty court judges (and winner of this year's Edward J. Devitt Distinguished Service to Justice Award) quoted extensively from this Court's unanimous decision in *Deep Sea Research*. App. B at 31a-35a. Judge King found that the Defendant aircraft should be removed from its maritime peril and that *thereafter* there would be an adjudication of ownership which the court would use to decide an appropriate salvage award. App. B at 42a. The learned admiralty court judge pointed out that under this Court's decision in *Deep Sea Research*, "The issue of abandonment and ownership are secondary to the question of whether this court can protect the Plaintiff's ongoing federal salvage rights as to the *In Rem* Defendant aircraft." App. B at 38a.

While Judge King's opinion is replete with *Deep Sea Research* citations [nine (9) in all], the Eleventh Circuit dismissed the applicability of *Deep Sea Research* finding that it had "no cause to interpret the Abandoned Shipwreck Act in this case". App. A at 11a. Judge Calvitt Clarke's April 27th, 1999 Opinion in *Sea Hunt, Inc. v. The Unidentified, Shipwrecked Vessel or Vessels*, 47 F. Supp. 2d 678 (E.D. Va. 1999) does not even *mention* this Court's unanimous Opinion and the Fourth Circuit's *Sea Hunt* decision refers to *Deep Sea Research* only as to requiring that, "The meaning of 'abandoned' under the ASA conforms to its meaning under admiralty law." App. C at 54a. The procedural mistake consistently being made in the Circuit's is allowing intervening claims of ownership to become determinative of the admiralty court's jurisdiction and the salvor's maritime lien. The tail *is* wagging the dog!

II.

THIS COURT MUST "ABANDON" THE CONFUSION IN THE CIRCUITS.

During June, 2000, there were two (2) Petitions for Writ of Certiorari filed with this Court, both of which dealt with the confusion and conflict between the Circuits on what constitutes "abandonment" under admiralty law. *Columbus-American Discovery Group, Inc. v. Atlantic Mut. Ins. Co.*, 203 F.3d 291 (4th Cir. 2000), Petition for Cert. filed, 68 U.S.L.W. 3757 (U.S. June 13th, 2000) (No. 99-1935) and *Yukon Recovery, LLC v. Ocean Mar, Inc.*, 205 F.3d 1189 (9th Cir. 2000), Petition for Cert. filed, 68 U.S.L.W. 3774 (U.S. June 20th, 2000) (No. 99-1958). This Court has already denied review on these cases, but there are *many* cases in the District Courts and Circuits that will end with a Petition to this Court to pronounce a clear national standard as to what the factual basis is that constitutes "abandonment" for the purpose of adjudicating claims under the admiralty court's *In Rem* jurisdiction. The petition to this court in *Sea Hunt*. (App. C) will be filed in the next few days. The two questions that this Court *must* address (preferably sooner than later) are: When, in an *In Rem* salvage action, does the adjudication of ownership by the court become necessary; and when it does become necessary, what uniform standard of "abandonment" must the admiralty courts apply?

This Court's *Deep Sea Research* Opinion went *much* further than a ruling on the ASA. This Court used two 1809 Opinions by Justices Story and Washington and 1868 and 1869 Opinions by Justices Field and Miller to point out that an *In Rem* salvage action is "complete" within itself. *Id.*, 523 U.S. at 502, 507. The Plaintiff/Salvor and the court's

possession of an *In Rem* Defendant constitutes a *fully justiciable* salvage action! Intervenors are not required, but they are "invited". With *In Rem* jurisdiction comes the admiralty court's responsibility to protect a salvor's maritime lien. The Eleventh Circuit decision invalidated the admiralty court's *In Rem* jurisdiction based entirely upon the intervening sovereign's claim of ownership and denial of any affirmative act of abandonment. App. A at 7a.When an admiralty court's Warrant for Arrest *In Rem* is executed against objects recovered by a Plaintiff/Salvor, there are only three (3) issues that the Court *must* address. The first is the existence of maritime peril, the second is the existence of voluntary salvage services, and third is whether the salvage is successful in whole or in part. *Legnos v. M/V Olga Jacob*, 498 F. Supp. 666 (5th Cir. 1974). If these are found to exist, then a maritime lien exists separate and apart from *any* issue of "ownership". *Treasure Salvors, III*, 640 F.2d at 567. The established law of salvage allows the admiralty court the exclusive right/ability to possess the salvaged property and protect the salvor's ongoing salvage rights. The admiralty court's superior right of possession and protection continues until the trial court has passed on title and determined a proper salvage award.

The common sense to this approach *should* be apparent. The "primary purpose" of the admiralty court's exclusive Article III, Section 2 jurisdiction is to save life and property. *Henner v. The United States*, 525 F. Supp. 350, 356 (S.D.N.Y. 1981) The factual issues of an intervenor's assertion of ownership and the salvor's "abandonment" defense are, "secondary to the question of whether this Court can protect the Plaintiff's ongoing federal salvage rights as to the *In Rem* Defendant aircraft." App. B at 38a.

In practically *all* of the older decisions of this Court and the Circuit Courts, salvage services were rendered *before* the *In Rem* action was filed (*i.e.*, the successful salvor brought the salvaged property into the nearest port and then the *In Rem* action was filed.) The issue of acceptance or rejection of voluntary salvage services by an owner occurred *prior* to federal admiralty court jurisdiction.

In this Court's latest two (2) cases involving *In Rem* salvage, *Florida Department of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982) and *Deep Sea Research*, 523 U.S. 491 (1998), the voluntary salvors had discovered the wreck sites of vessels long-lost and forgotten by their original owners. Disclosure of the salvor's knowledge of the existence of the wrecksites (and their location) was necessary for the purpose of invoking the admiralty court's exclusive jurisdiction over the salvage and the protection of the wrecksite from third parties. Intervention by other salvors and those who purported to be the original owners was encouraged and freely allowed. What is most important, however, is that the admiralty court's initial decision *did not involve ownership*. The admiralty court's first decided if a maritime peril existed, whether the salvage was being voluntarily rendered and whether it was (or had the probability of being) successful in whole or in part.

A primary/fundamental point that this Court has *not* addressed is the procedure the admiralty courts must use when an intervenor (sovereign or private) appears claiming ownership *and* seeking an injunction prohibiting further salvage. When this occurs, the admiralty court must then adjudicate whether the ownership claim is valid. The intervenors ownership claim and the Plaintiff/Salvor "abandonment" defense became factual issues based upon

whether *all* of the facts, considered together (*i.e.*, "implied" abandonment) constitute "abandonment" by the original owner. The "express abandonment" approach forecloses any factual inquiry into all of the circumstances. It is this very factual inquiry that the admiralty court *must* be allowed to use to fashion an appropriate salvage award!

Once an admiralty court finds a valid ownership claim, the admiralty court *must* continue it's inquiry to determine if the owner (who is seeking to terminate salvage services) has made adequate provisions to mount a timely effort to save the *In Rem* Defendant from its maritime peril. If an intervening owner wishes to terminate all salvage services by voluntary salvors *and* mount a timely effort to remove the *In Rem* Defendant from it's maritime peril, the admiralty court, using its factual inquiry into all of the circumstances and its equitable powers must determine whether the future salvage rights of the voluntary salvor must be terminated and if so, what an appropriate salvage award will be. Equity, common sense and the admiralty court's exclusive jurisdiction over admiralty and maritime claims will not allow an intervening ownership claim to terminate salvage without first insuring the removal of the *In Rem* Defendant from it's maritime peril. It *is* that simple!

When adjudication of ownership becomes necessary, there must be *one uniform standard* of "abandonment" for all United States admiralty courts to apply. "*The Lottowanna*", 21 Wall. 558, 575, 22 L. Ed. 654 (1875). This being said, it is important that this Court take note that in the vast majority of cases the issue of ownership will become a factor *only* in the admiralty court's determination of a proper salvage award. The salvor's "defense" to an intervenor's assertion of ownership must be a fact-driven,

flexible determination of "abandonment" by the admiralty court *after* inquiry into all of the circumstances of the original loss. The Circuit Courts must not be allowed to conduct "appellate fact-finding" that this Court proscribed in *Anderson v. Bessemer City*, 470 U.S. 564 (1985).

In the Eleventh Circuit decision below, the court did not overturn Judge King's factual findings, it totally disregarded them! The Eleventh Circuit concluded that the United States Constitution, Article IV, Section 3, Clause 2 (Public Lands) requires not only an "affirmative act" on the part of the federal government, but "authorization by Congress" before there can be an adjudication of sovereign "abandonment". App. A at 7a. The Eleventh Circuit cited as authority for this proposition *United States v. California*, 332 U.S. 19 (1947), a case involving oil rights beneath public lands. App. A at 7a.

By adopting the Fourth Circuit's "express abandonment" standard for all sovereign intervenors and then requiring a "act of Congress" in order to give support to the "affirmative act" of abandonment, the Eleventh Circuit has effectively put the federal government and foreign governments in a position of refusing to recognize *any In Rem* maratime salvage lien on property which once belonged to a sovereign. App. A at 17a. It is expressly for this reason that an "implied abandonment", rather than "express abandonment" standard must be adopted by this Court for use by all United States admiralty courts. Allowing the courts to use a strict "express abandonment" standard on a sovereign intervenor's claim of ownership without "actual possession" provides "*sovereign immunity*" which is directly contrary to this Court's holding in "*The Davis*", 10 Wall. 15, 19 L. Ed. 875 (1869) and *Deep Sea Research*, 523 U.S. at 507. In overturning Judge James Lawrence King's decision, the

Eleventh Circuit panel dismissed this Court's unanimous decision by stating, "*Deep Sea Research* is inapposite, however, for we have no cause to interpret the Abandoned Shipwreck Act in this case." App. A at 11a. Putting the adjudication of an intervenor's ownership claim *before* the initial admiralty decisions of maritime peril and voluntary salvage services and then requiring "Congressional authority" and "express abandonment" of an *In Rem* Defendant (originally owned by the United States) and *then* allowing the United States to "refuse" further salvage services, leads to *absurd* results!

The conflicts in the circuits will *all* be resolved if this Court realizes that requiring "express abandonment" by a sovereign, coupled with a sovereign's refusal of salvage services (while failing to address the continuing maritime peril) *is a total, irrevocable, abandonment*! Imagine the absurd result in *Deep Sea Research* if, on remand, the State of California prevailed on ownership and then refused further salvage services by *Deep Sea Research*, the original finder and salvor. What would be an appropriate salvage award? How would it be paid? How would the state protect the wrecksite? How does one *unfind* a spanish galleon?

III.

THE APPLICATION OF AN EXPRESS ABANDONMENT STANDARD RESULTS IN A "DEATH PENALTY" FOR *IN REM* DEFENDANTS RECOGNIZED UNDER THE LAWS OF ADMIRALTY.

"The admiralty law of this country personifies the vessel and holds 'that the vessel, and whosesoever hands she lawfully is, is herself considered as the wrongdoer liable in tort and subject to a maritime lien for the damages.' " *Ralli v. Troop*, 157 U.S. 386, 403 15 S. Ct. 657, 39 L. Ed. 742 (1894). Justice White in *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 102 S. Ct. 3304, 73 L. Ed. 2d 1057 (1982), observed that the plurality had endorsed the admiralty concept of "personification" when he stated: "The allowance of an *In Rem* suit against arguably state owned maritime property rests on the 'personification' theory of the *res* — that the action runs against the *Atocha* and not the State of Florida."

Having a national standard of express abandonment *and* allowing rejection of further salvage services "condemns" future *In Rem* defendants. Why would any salvor *ever* seek to identify a wreck or even disclose its location?

Much of the history of this and other countries remains lost under the navigable waters surrounding this great nation. This lost property is waiting to provide its historical, archaeological, and monetary wealth to the public. Unless those with the resources, ingenuity, ability and willpower are allowed to undertake search and salvage activities, the loss of historical and archaeological information to this nation (and others) will be catastrophic. One fact should be

abundantly clear; those potential *In Rem* Defendants considered as "persons" in the admiralty courts will surely "die" if this Court allows the express abandonment standard to survive. Liberty for wolves is death for the lambs. Property in maritime peril, lost and subject to certain destruction by the elements, will go undisclosed, undiscovered and/or unrecovered without this Court's *immediate* intervention.

Nearly two and one-half years ago in this Court's unanimous opinion, this Court recognized a *direct* correlation between sovereign immunity principles applicable to the states, the federal government and foreign governments. *Deep Sea Research*, 523 U.S. at 506-07. Eighteen (18) years ago, in *Treasure Salvors*, Justice White discussed the concept of "sovereign immunity" from maritime salvage liens in "*In Rem* actions brought against vessels in which an official of the state, the federal government, or a foreign government has asserted ownership of the *res*." *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670 at 710. On page 507 of this Court's unanimous opinion in *Deep Sea Research*, this Court cited two of this Court's prior decisions as standing for the proposition that a maritime lien against property of the United States is *only* forbidden where the *actual possession* of the United States must be invaded under process of the Court. Both cases, "*The Siren*", 74 U.S. 152, 161 (1868) and "*The Davis*", 77 U.S. 15, 19 (1869), cited Justice Story's decision in *United States v. Wilder*, 28 F. Cas. 601 (1838) as primary authority. The *Wilder* decision involved the maritime lien of a salvor against cotton belonging to the United States. Justice Story (and Judge King) ruled against the government in its argument that a maritime salvage lien could not attach to property belonging to the United States. In *Wilder*, Justice Story stated:

> And it seems to me a fair inference from the duties of the sovereign, in such cases, that where a lien exists on property, upon general principles of justice, *jure gentium*, that lien ought to be presumed to be admitted and protected by every sovereign, until the presumption is repelled by some positive edict to the contrary. None such exists in our country.

Id. at 604.

* * * * *

> It is what the law calls "*jus liquidissimum*", the clearest general right, that they, who have saved life and property at sea, should be rewarded for such salutary exertions; and those, who say, that they are not bound to reward, ought to prove their exemption in very definite terms, and by arguments of irresistible cogency. . . . And I cannot think, that public policy will be promoted, and not impugned, by holding, that the remedy for the reward is not uncertain or precarious, but attaches as a lien, primarily *In Rem*, and does not await the slow, or tardy, or distant justice of the government in awarding it. If there ever was a case, which ought to be settled by a court of justice, upon principles of right and liberality, this is precisely that case. No court of justice ought to decline to enforce it, unless there be some clear, definite and incontrovertible prohibition against the exercise of it.

Id. at 604.

In "*The Davis*", this Court stated, in citing *United States v. Wilder*:

> We are quite satisfied with the reasons on which the principle rests, and are of the opinion that when the property of the government has been saved from destruction by salvors, or by those sacrifices which are compensated by a contribution in general average, justice and sound policy require that it should be held to bear its share of the burden which the unanimous voice of maritime nations imposes on all other property in like condition.

77 U.S. 15, 19 (1869).

IV.

THE DEATH OF THE ABANDONED SHIPWRECKED ACT.

If the above reasons are not enough, this Court should grant the Writ of Certiorari in order to review the *disastrous* effect the decision below will have on the Abandoned Shipwreck Act of 1987 (ASA), 102 Stat. 432, 43 U.S.C. § 2101-§ 2106. Four (4) days after the Eleventh Circuit's decision in *International Aircraft Recovery*, the Fourth Circuit issued its Opinion in *Sea Hunt Inc. v. The Unidentified Shipwrecked Vessel or Vessels*, 221 F.3d 634 (4th Cir. 2000). (App. C). In the Fourth Circuit's *Sea Hunt* decision, Article X of the 1902 Treaty of Friendship and General Relations between the United States and Spain was quoted for the proposition that, "In cases of shipwreck, damages at sea, or forced putting in, each party shall afford to the vessels of the other . . . the same immunities which would have been granted to its own vessels in similar cases."

App. C at 57a. The Fourth Circuit held that the 1902 Treaty of Friendship . . . "requires that imperiled Spanish vessels *shall receive the same immunities conferred upon similarly situated vessels of the United States*." (emphasis supplied) App. C at 57a. In the Eleventh Circuit's Opinion below, (App. A) and in the Fourth Circuit's Opinion four (4) days later in *Sea Hunt* (App. C), this Court's Opinion in *United States v. California*, 332 U.S. 19 (1947) is quoted for the proposition that the United States Constitution, Article IV, Section 3, **[Public Lands]** requires the government to hold its interests in trust for all the people and that governmental property cannot be relinquished on "principles similar to laches, estoppel or adverse possession". App. C at 58a. When improperly used in an admiralty proceeding this reliance on land-based law and it's connection to the requirement of showing an "express abandonment" of public lands by a sovereign is the downfall of the Abandoned Shipwreck Act. If this Court allows the Eleventh Circuit's decision in *International Aircraft* to stand (requiring a Congressional Act coupled with an express abandonment) it will provide a "sovereign immunity" to all vessels/aircraft originally owned by the United States. Under the Fourth Circuit's *Sea Hunt* decision, all vessels originally owned by Spain . . . "shall receive the same immunities conferred upon similarly situated vessels of the United States." App. C at 57a. To require a voluntary salvor to prove "express abandonment" by an intervening sovereign over vessels which were lost and forgotten (long before there was any legal concept of "express abandonment") is the death of *both* the Abandoned Shipwreck Act *and* common sense.

As the Fifth Circuit stated in *Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330 (5th Cir. 1978):

> Disposition of a wrecked vessel whose very location has been lost for centuries as though its owner were still in existence stretches a fiction to absurd lengths.

Id., 569 F.2d at 337. Stretching "express abandonment" to a time before such a legal fiction existed *is* "absurd"!

As set forth above, an intervening sovereign's ownership claim, construed under the "express abandonment" theory, gives sovereign immunity against all *In Rem* salvage claims *and* the operation of the Abandoned Shipwreck Act of 1987. The ASA asserts national sovereignty over "abandoned shipwrecks" and then conveys them to the coastal states and island jurisdictions in whose submerged lands they lie imbedded. Because a state or a salvor's attempt to show "express abandonment" of sovereign vessels and aircraft over fifty (50) years old *is* a futile act, the ASA is rendered useless. Over twenty (20+) states have laws passed under the ASA. If this Court does not review *International Aircraft* and/or *Sea Hunt*, the United States, assisting foreign sovereigns, will totally destroy the effectiveness of the 1987 Abandoned Shipwreck Act. If, on the other hand, the "implied abandonment" principle is used by this Court in defining the meaning of "abandoned" under admiralty law, the Abandoned Shipwreck Act maintains its viability and the historical and archaeological heritage of the states, the federal government and the world will be protected.

CONCLUSION

The decision of the Eleventh Circuit "personifies" the confusion and jurisdictional conflicts in the admiralty courts of this nation. The admiralty courts' mandatory procedure of assuring the removal of an *In Rem* Defendant from its maritime peril and protecting a voluntary salvor's maritime lien, *must* take precedence over a private or sovereign intervenor's claim of ownership. A salvor's "abandonment" defense to a private or sovereign intervenor's ownership claim *must* allow a full presentation and examination of all the facts and circumstances of each *In Rem* salvage claim. By granting this Petition for Writ of Certiorari, this Court will provide our admiralty courts with national standards that will stop the conflicts in the Circuits and protect the Abandoned Shipwreck Act.

Respectfully submitted,

DAVID PAUL HORAN
Counsel of Record
EDWARD W. HORAN
HORAN, HORAN & WALLACE, LLP
Attorneys for Petitioner
608 Whitehead Street
Key West, Florida 33040-6549
(305) 294-4585

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED JULY 17, 2000

United States Court of Appeals,
Eleventh Circuit.

INTERNATIONAL AIRCRAFT RECOVERY, L.L.C.,
a Nevada Limited Liability Company,

Plaintiff-Counter-Defendant-Appellee,

v.

The UNIDENTIFIED, WRECKED AND ABANDONED AIRCRAFT, her armament, apparel, and cargo located within one marine league of a point located at 25-00043'34" N Latitude and 80-2'8" W Longitude,

Defendant,

United States of America,

Intervenor-Defendant-Counter-Claimant-Appellant.

No. 99-13117.

July 17, 2000.

* * *

Appeal from the United States District Court for the Southern District of Florida.

Appendix A

Before EDMONDSON, BARKETT and KRAVITCH, Circuit Judges.

KRAVITCH, Circuit Judge:

The United States appeals a district court order upholding the right of International Aircraft Recovery ("IAR") to salvage, over the objection of the federal government, a Navy torpedo bomber that crashed in the Atlantic Ocean during World War II. We hold that the United States, as owner of the plane, can prohibit IAR's salvage efforts; accordingly, we reverse.

I. BACKGROUND AND PROCEDURAL HISTORY

This lawsuit involves a Navy "Devastator" TBD-1 torpedo bomber that crashed off the Florida coast during a training flight in 1943. Built in 1938, the plane flew "neutrality patrol" in the central Atlantic until it was assigned in mid-1941 to the aircraft carrier Yorktown operating in the Pacific. In 1942, the plane participated in the Battles of Midway and the Coral Sea. During the Battle of the Coral Sea, TBD-1 torpedo bombers sank the Japanese aircraft carrier Shoho and badly damaged the carrier Shokaku. The Yorktown suffered substantial damage itself during the battle, but the carrier was able to recover many of her aircraft, including the subject of this suit.

After overhauling the TBD-1, the Navy used the plane for training in Miami, Florida. During a torpedo attack instruction flight on July 1, 1943, the TBD-1 experienced

mechanical difficulties. The pilot and crew parachuted safely from the plane, which crashed in deep international waters approximately eight miles east of Miami Beach.

The Navy did not know exactly where the TBD-1 crashed, and it "struck" the plane from the inventory of active aircraft in September 1943. Since that time, the Navy has taken no steps to locate or salvage the plane.

In 1990, a group searching for Spanish galleons located the TBD-1 and offered to sell the location to the National Museum of Naval Aviation. The museum declined because it did not have a budget for new acquisitions. The discoverers then sold the plane's location to Windward Aviation, a corporation controlled by Douglas Champlin, a private collector of fighter planes. Champlin negotiated to salvage the plane and turn it over to the Museum of Naval Aviation in exchange for other aircraft, but the parties never reached an agreement.

Since purchasing the location of the TBD-1, Champlin has conducted two brief salvage operations. In 1994, salvors filmed the wreck site and recovered a portion of the torpedo bomber's canopy. In 1998, Champlin made another videotape and recovered the plane's radio mast. Champlin and the companies he controls, including IAR, have invested over $130,000 in the salvage of the TBD-1.

Worried that other salvors would assert claims to the wreckage, Champlin, as President of Windward Aviation, Inc., filed an in rem action in 1994 to secure his exclusive salvage rights. After the federal government expressed its

objections to Champlin's salvage efforts, he voluntarily dismissed the lawsuit and turned the canopy over to the National Museum of Naval Aviation.

After more unsuccessful negotiations with the Navy, Champlin filed this second in rem action through IAR. The action sought an injunction barring any interference with the plaintiff's exclusive salvage rights, and either a full and liberal salvage award or title to the aircraft under the law of finds. The government intervened and both parties filed motions for summary judgment. The district court, holding that IAR had the right to continue its salvage efforts and that it would be entitled to a salvage award, granted IAR's motion and entered final judgment. The court retained jurisdiction to determine the salvage award later, and granted the United States permission to intervene in those proceedings.

IAR claims it is not interested in keeping the TBD-1 itself, but still believes that the plane belongs on display at the National Museum of Naval Aviation. In its final order, the court intimated that during salvage proceedings it might award the TBD-1 to the museum and calculate appropriate compensation for IAR. Both parties agree that the in rem defendant aircraft is of substantial historical value, both because of its participation in the Battles of Midway and the Coral Sea, and because no TBD-1 planes have been preserved for display or study. In fact, the only other known TBD-1 also lies submerged in deep water.

Appendix A

II. DISCUSSION

In its final order, the district court granted IAR permission to proceed with salvage operations over the objection of the United States. The United States argues that it is the owner of the crashed TBD-1, and that as such, it can reject salvage efforts by third parties.

A. Abandonment

The law of salvage generally governs efforts to save vessels in distress. Under the law of salvage, rescuers take possession of, but not title to, the distressed vessel and its contents. See Columbus-America Discovery Group v. Atlantic Mut. Ins. Co., 974 F.2d 450, 459 (4th Cir.1992); Martin J. Norris, The Law of Salvage, in 3A Benedict on Admiralty § 150 (rev. 7th ed.1999). A court then fashions an appropriate award for the salvors' services. A vessel without owner, however, is subject to the law of finds, summed up succinctly as "finders keepers," rather than the law of salvage. See id. at 459-60; Norris, supra, § 158. Admiralty law presumes that owners do not give up title to ships and cargo in marine peril, even if cargo is swept overboard or a crew has to leave its vessel on the open water. See Columbus-America, 974 F.2d at 460 (quoting Hener v. United States, 525 F.Supp. 350, 356-57 (S.D.N.Y.1981)); Norris, supra, § 150. The law recognizes, however, that owners can "abandon" all interests in their vessels. See Fairport Int'l Exploration, Inc. v. The Shipwrecked Vessel, 177 F.3d 491, 498 (6th Cir.1999); Treasure Salvors,

Inc. v. The Unidentified Wrecked & Abandoned Sailing Vessel, 569 F.2d 330, 336-37 (5th Cir.1978).[1]

IAR argues that the district court made a factual finding, which we would review for clear error, that the Navy had abandoned all interest in the wrecked TBD-1. A careful reading of the court's opinion, however, reveals that it contains no such finding. Although the district court discussed in its opinion whether the United States retained ownership of the TBD-1 or had abandoned the plane, it did not resolve the matter. "[T]he issue of abandonment and ownership are [sic] secondary to the question of whether this Court can protect the Plaintiff's ongoing federal salvage rights as to the In Rem Defendant aircraft," wrote the court.[2] Consistent with this focus on salvage rights rather than title under the law of finds, the court retained jurisdiction and clearly envisioned conducting salvage award proceedings in the future. Had IAR acquired title to the TBD-1 through the law of finds, there would be no basis for salvage award proceedings because courts do not supervise the efforts of owners to preserve their own property.

Although the court's opinion strongly suggests that the court believed the United States had abandoned the TBD-1, it was correct to avoid such a holding based on the evidence before it. The Constitution gives Congress the power to dispose of all property, real and personal, belonging to the

---

1. Decisions by the former Fifth Circuit issued before October 1, 1981, are binding as precedent in the Eleventh Circuit. See Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir.1981) (en banc).

2. Op. at 17, in R1, Tab 32.

United States. See U.S. Const. art. IV, § 3, cl. 2 ("the Property Clause"). As courts consistently have recognized, the federal government cannot abandon property absent an affirmative act authorized by Congress. See Royal Indem. Co. v. United States, 313 U.S. 289, 294, 61 S.Ct. 995, 997, 85 L.Ed. 1361 (1941).

> The Government, which holds its interests . . . in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable property rights by their acquiescence, laches, or failure to act.

United States v. California, 332 U.S. 19, 40, 67 S.Ct. 1658, 1669, 91 L.Ed. 1889 (1947). In the realm of admiralty law, courts have held that the United States has not abandoned its interests in ships sunk over a century ago during the Civil War. See United States v. Steinmetz, 973 F.2d 212, 222-23 (3d Cir.1992); Hatteras, Inc. v. The U.S.S. Hatteras, 1984 A.M.C. 1094, 1097-1101 (S.D.Tex.1981).

IAR argues that the Navy abandoned all interests in the TBD-1 when it struck the bomber from its inventory of active planes. This argument relies heavily on the response of Dr. William Dudley, the Director of Naval History for the U.S. Navy, to a hypothetical question during his deposition. Asked how an aircraft carrier captain who destroyed excess planes

at sea before returning to port at the end of World War II would indicate the "final disposition of those aircraft" to a new captain taking over command of the carrier, Dr. Dudley speculated that "[i]f there is an inventory, I would expect to see some kind of an inventory," and that "[t]he term usually used [on such an inventory] is stricken."[3]

Dr. Dudley qualified his answer as conjectural, and expressed the need to research the question.[4] Moreover, Dr. Dudley's answer does not address how the Navy would officially divest itself of all property interests in those destroyed planes. Later during the deposition, Dr. Dudley clarified that the Navy could abandon title to an aircraft only by asking Congress to pass specific legislation.[5] In an earlier affidavit, Dr. Dudley testified that "[t]he term 'stricken' refers to the administrative action which removes an aircraft from active service and the related maintenance and reporting requirements for such service, but it does not denote or imply a final disposition of such aircraft."[6] This interpretation is consistent with a Navy circular distributed in 1944 recommending the "striking" of all aircraft that had crashed or were heavily damaged, to be followed by salvage operations.[7]

---

3. Dudley Dep. at 61, in R1, Tab 28, Ex. A.

4. See id. at 60.

5. See id. at 71.

6. Dudley Aff. at para. 11, in R1, Tab 20, Ex. 1.

7. See J.S. McCain, Deputy Chief of Naval Operations, Aviation Circular Letter No. 72-44, Aircraft — Striking and (Cont'd)

IAR did not cite, and we could not find, any statute in effect in 1943 authorizing the Navy to abandon planes by simply "striking" them from the inventory of active aircraft.

The district court suggested that the Navy may have abandoned the TBD-1 pursuant to the Surplus Property Act of 1944, which directed that "[s]urplus property shall be disposed of." Pub.L. No. 78-457, § 4, 58 Stat. 765, 768 (1945). Far from a rigid decree, however, the Act mandated only that the disposal of surplus property occur "to such extent, at such times, in such areas, by such agencies, at such prices, upon such terms and conditions, and in such manner, as may be prescribed in or pursuant to this Act." Id. The Act did not mention the abandonment of property; its focus instead was on the sale of surplus of World War II materiel, including salvage and scrap. See id. §§ 2 & 15, 58 Stat. at 766, 772-73.[8]

The Act established a Surplus Property Board to regulate and facilitate the disposal of excess military supplies, see id. at § 5, 58 Stat. at 768, and subsequent legislation renamed

---

(Cont'd)
Disposition Of, at para. 2 (July 24, 1944), in R1, Tab 28, Ex. B. The analogous case of Kern Copters, Inc. v. Allied Helicopter Serv., Inc., 277 F.2d 308 (9th Cir.1960), also is consistent with this interpretation. In Kern, the Ninth Circuit concluded that the Army did not abandon a helicopter that had crashed in Guatemala by "dropping [it] from accountability records." Id. at 312-13.

8. The Act also permitted the donation of surplus supplies in certain circumstances. See Pub.L. No. 78-457 § 13(b), 58 Stat. at 768, 771.

the Board as the Surplus Property Administration, see Pub.L. No. 79-181, 59 Stat. 533, 533 (1945). It was the Surplus Property Administration that first adopted regulations permitting agencies to abandon war materiel. See Surplus Property Administration Regulation § 8319, 10 Fed.Reg. 14966 (1945).[9] Even in the most permissive scenario, according to these regulations, agencies could only abandon property after an affirmative finding made by a "responsible officer, approved by a reviewing authority," and reduced to writing. See id. § 8319.7, 10 Fed.Reg. at 14967.[10] The Navy neither made such findings nor compiled the written report required to abandon property pursuant to the Surplus Property Administration's regulations.[11]

---

9. See also Surplus Property Administration Regulation § 8304.13, 11 Fed.Reg. 180 (1946) (dictating that the "abandonment of surplus aeronautical property shall be governed by the provisions of Part 8319").

10. Typically, the process for abandoning property was more onerous, requiring not only written factual findings about the property's value or the cost of maintenance and handling, but also publication of a notice for thirty days offering to sell or donate the property. See id. § 8319.3 & 8319.6, 10 Fed.Reg. at 14967.

11. IAR points out that these regulations only apply to property in "the continental United States, its territories and possessions." Surplus Property Administration Regulations §§ 8304.2 & 8319.2. Even assuming that these regulations would not cover an airplane that was based in the continental United States but that crashed in international waters, however, does not lead to the conclusion that the United States has abandoned the in rem defendant TBD-1. As explained in the text, the primary method for disposing of surplus

(Cont'd)

As an alternative argument, IAR claims that the Property Clause does not apply in the admiralty context and that we instead should apply the common law test for abandonment to determine whether the federal government has lost title to the TBD-1. In support of its position, IAR cites the Supreme Court's statement in California v. Deep Sea Research, Inc., 523 U.S. 491, 508, 118 S.Ct. 1464, 1473, 140 L.Ed.2d 626 (1998), that "the meaning of 'abandoned' under the [Abandoned Shipwreck Act] conforms with its meaning under admiralty law." Deep Sea Research is inapposite, however, for we have no cause to interpret the Abandoned Shipwreck Act in this case.[12] Furthermore, Deep Sea

---

(Cont'd)
property under the 1944 Act was by sale. This holds true for aircraft beyond the United States' territorial limits. See Surplus War Property Administration Regulation § 4, 9 Fed.Reg. 11727 (1944) (establishing a pricing policy for surplus aircraft both within the United States and abroad). Before Regulation § 8304, the Surplus Property Board or Administration apparently had to consider requests to dispose of surplus property in an extraordinary manner (such as by abandonment) on a case-by-case basis. See, e.g., Surplus Property Board Special Order 18, 10 Fed.Reg. 11039 (1945) (permitting the abandonment of surplus submarine and torpedo netting by the Navy). There is no indication in the record that the Surplus Property Board or Administration granted permission to abandon crashed Navy planes.

12. The Abandoned Shipwreck Act asserts title to abandoned shipwrecks "embedded in submerged lands of a State" on behalf of the federal government, and then transfers that title "to the State in or on whose submerged lands the shipwreck is located." 43 U.S.C. § 2105 (2000). Neither party has argued that the Act applies in this case, perhaps because the in rem defendant is not a shipwreck and is not "embedded in the submerged lands of a State."

Research involved a privately-owned steamship with privately-insured cargo. See id. at 495, 118 S.Ct. at 1467. IAR cites no other cases for the proposition that the common law of admiralty supercedes the Constitution, and we do not find the argument convincing.

B. Salvage

In ruling that the United States could not prevent IAR's efforts to raise the in rem defendant TBD-1, the district court concluded that the law of salvage gives salvors the absolute right to aid any vessel that is in a state of marine peril if a prudent owner would have accepted the assistance. No one disputes that the TBD-1 torpedo bomber, submerged in a corrosive environment and slowly disintegrating, is in a state of marine peril.[13] The district court, however, under-appreciated the authority of a vessel's owner to prevent others from interfering with its property.

The law of salvage is intended to encourage rescue, see Columbus-America, 974 F.2d at 460 (quoting Hener, 525 F.Supp. at 356), and often aid must be administered quickly

---

13. Nor do the parties dispute that the law of salvage can apply to submerged airplanes. Although the archetypical case of salvage may involve a damaged ship in danger of sinking, "[i]t is settled that all manner of objects other than vessels and their cargo are subject to salvage." 2 Thomas J. Schoenbaum, Admiralty and Maritime Law § 16-2 (2d ed.1994). Raising sunken craft and property is a recognized salvage service, see Norris, supra, § 31, and courts have allowed salvage claims for long- submerged wrecks, see, e.g., Platoro Ltd. v. The Unidentified Remains of a Vessel, 695 F.2d 893, 901-02 (5th Cir.1983).

when ships are in peril. Therefore, when a ship is in distress and has been deserted by its crew, anyone can attempt salvage without the prior assent of the ship's owner or master. See The Laura, 81 U.S. (14 Wall.) 336, 344-45, 20 L.Ed. 813 (1871); The Bark Island City, 66 U.S. (1 Black) 121, 128, 17 L.Ed. 70 (1861); Norris, supra, § 136. Put another way, when a salvor comes upon a vessel in distress, he can assume the owner would want assistance. The owner of the derelict vessel cannot contest the salvor's right to attempt a rescue by claiming after the fact that the assistance was unwanted. See, e.g., The Laura, 81 U.S. (14 Wall.) at 344-45.

This rule of law, however, does not mean that an owner cannot reject salvage assistance in a timely manner. It is useful to quote the full passage in the Supreme Court opinion cited by the district court for its "prudent owner" proposition: "While salvage cannot be exacted for assistance forced upon a ship, her request for or express acceptance of the service is not always essential to the validity of the claim. It is enough if, under the circumstances, any prudent man would have accepted." Merritt & Chapman Derrick & Wrecking Co. v. United States, 274 U.S. 611, 613, 47 S.Ct. 663, 664, 71 L.Ed. 1232 (1927) (citation omitted).

In support of its order, the district court cited one relatively recent opinion in which the Ninth Circuit suggested that an owner could only reject salvage services if doing so were prudent. See Tidewater Salvage, Inc. v. Weyerhaeuser Co., 633 F.2d 1304, 1307 (9th Cir.1980) ("An owner, acting as a prudent person, may refuse salvage assistance by completed communication to the prospective salvor at any

time before the act of salvage."). The court authorized a salvage award, however, because it determined that the Weyerhaeuser lumber company had not rejected effectively the assistance of the salvors.[14] The caveat in Tidewater Salvage about the "prudent owner" is therefore dicta, and it appears never to have been put to the test; we could find no decision based on the prudence of rejecting salvage services.

A related basis for the district court's holding was the theory that owners can only reject salvage services if they have made alternative plans to recover their vessels. The court cited Spreckels v. The State of California, 45 F. 647, 649 (N.D.Cal.1890), which reads, "where the owners of a vessel in peril have taken all measures in their judgment necessary to insure her safety, and those measures are adequate, and all that prudence requires, other parties have no right to obtrude their services." The Spreckels court later stated that "[t]he owner of a vessel disabled or in distress does not thereby lose the control of his property. He has the right to refuse or accept any offers of assistance that may be made, or to adopt his own measures for the preservation of his vessel." Id. at 650 (emphasis added). The equivocation is understandable, for both of the statements quoted above are dicta, unconnected to the resolution of the case. The Spreckels court, like the Ninth Circuit in Tidewater Salvage,

---

14. The salvors in Tidewater Salvage retrieved logs in Coos Bay that had drifted away from lumber mills. The court determined that Weyerhaeuser's blanket policy rejecting such assistance did not put the salvors on notice to ignore particular logs, because the salvors could not determine a log's owner until they had already recovered the drifting lumber. See 633 F.2d at 1307.

granted a salvage award because the owner of the distressed vessel had not rejected the salvors' services.[15] See id. at 651.

We reject the district court's reasoning and instead interpret the law of salvage to permit the owner of a vessel in marine peril to decline the assistance of others so long as only the owner's property interests are at stake. This view is consistent with the Supreme Court's statement in Merritt & Chapman that "salvage cannot be exacted for assistance forced upon a ship." 274 U.S. at 613, 47 S.Ct. at 664.

Other cases strongly support this interpretation of salvage law as well. In an oft-cited case, a district court in Louisiana stated the rule in forceful language: "If the master of a burning vessel prefers to allow her to burn rather than to permit outside parties to extinguish the flames, he may do so. He has a perfect right to decline any assistance that may be offered him: he should not be assisted against his

---

15. The court cited two other cases, but neither supports either the proposition that owners can reject aid only if it would be "prudent" or the notion that owners can reject aid only if they have made arrangements to save their vessels on their own. Manchester Brigade v. United States, 276 F. 410, 413 (E.D.Va.1921) simply holds that a salvage award is available when a vessel calls for and accepts assistance, but dismisses the responding vessel before its mission is accomplished. In Hamburg-American Line v. United States, 168 F.2d 47, 56 (1st Cir.1948), the First Circuit held that the Navy was entitled to a salvage award for saving a German freighter scuttled and abandoned by its crew. The First Circuit concluded that the freighter's master had never rejected the offer of salvage assistance. The court also considered the "dictates of equity": the ship's owner could not claim both that it wanted the freighter to sink and that the ship should be returned to its possession. Id. at 55-56.

will." New Harbor Protection Co. v. Steamer Charles P. Chouteau, 5 F. 463, 464 (D.La.1881); accord The Indian, 159 F. 20, 25 (5th Cir.1908) ("Under nearly all supposable circumstances when the master is in command and control of his own ship he may refuse and reject salvage services, and no volunteer salvor can force on him, and be rewarded for, services which he forbids."); cf. Legnos v. M/V Olga Jacob, 498 F.2d 666, 672 (5th Cir.1974) ("So long as the services . . . are not rejected by those in authority a bystander or interloper is eligible for [a] salvage award in proportion to the value of his contributory efforts.").[16] We have no occasion in this case to consider whether an owner could refuse salvage assistance if anything other than its own property interests were at stake.[17] Cf. Ramsey v. The

---

16. The authors of admiralty treatises agree that owners can reject salvage assistance. According to Martin J. Norris, "Salvage services should not be thrust upon the unwilling. . . . It is the privilege of the master to accept proffered salvage services or not, so long as the vessel in distress is then in a position where nothing but ordinary property interests are involved." Norris, supra, § 114 (footnote omitted). Another treatise expresses the same view: "Salvage cannot be forced upon an owner or his agent in possession of the vessel; a salvor who acts without the express or implied consent of the owner is a 'gratuitous intermeddler,' who is not entitled to any salvage award." 2 Thomas J. Schoenbaum, Admiralty and Maritime Law § 16-1 (2d ed.1994). Addressing the more specific issue of historic wrecks, the treatise author reasons that "[o]nly in a rare case where the governmental owner gives express or implied consent to salvage, should an award be given because the government has full power to reject or prohibit the services." Id. at § 16-7 (footnote omitted).

17. IAR suggests that as a matter of policy, we should permit the salvage of the TBD-1 because its condition is deteriorating and

(Cont'd)

Pohatcong, 77 F. 996, 997 (S.D.N.Y.1896) (holding that a tug boat was "bound to respect the master's decision [refusing salvage assistance], and had no legal right to impose [its] services upon him," at least as long as the refusal did not injure, among other things, the property interests of others).

In the context of salvage claims pertaining to historic wrecks, numerous courts have held that title holders can prevent salvors from raising long submerged vessels. The Fifth Circuit noted that "[a] salvage award may be denied if the salvor forces its services on a vessel despite rejection of them by a person with authority over the vessel," but held that the titleholder to an historic ship submerged off its shores had not rejected the plaintiff's salvage services. See Platoro Ltd. v. The Unidentified Remains of a Vessel, 695 F.2d 893, 901-02 (5th Cir.1983). A Virginia district court held that a plaintiff could not continue salvage operations on an 1802 Spanish shipwreck without the permission of Spain, which retained title to the submerged vessel. See Sea Hunt, Inc. v. The Unidentified, Shipwrecked Vessel or Vessels, 47 F.Supp.2d 678, 692 (E.D.Va.1999); see also Lathrop v. The Unidentified, Wrecked & Abandoned Vessel, 817 F.Supp. 953, 964 (M.D.Fla.1993); Jupiter Wreck, Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel, 691 F.Supp. 1377, 1389 (S.D.Fla.1988) (" '[P]otential salvors'

(Cont'd)
time for recovering the plane is running short. We have no occasion to consider this policy argument, however, because it does not implicate any rights or legally cognizable interests — beyond that of the United States in its own property — that could affect our interpretation of the law of salvage.

do not have any inherent right to save distressed vessels. Their activities must be subject to the owner's acquiescence."). Finally, this circuit considered the case of an eighteenth century ship sunk in the waters of Biscayne National Park and, after holding that the plaintiff was not entitled to a salvage award because the vessel was not in marine peril, noted that "the owner of the property [the United States] may not even have desired for the property to be 'rescued.' " See Klein v. The Unidentified, Wrecked & Abandoned Sailing Vessel, 758 F.2d 1511, 1515 (11th Cir.1985).

Based on this review of the law of salvage, we conclude that IAR has no right to continue salvage operations over the express objections of the TBD-1's owner. On the other hand, IAR may be eligible for a salvage award for Champlin's past efforts. A party states a valid claim for a salvage award if it renders voluntary assistance that contributes to the rescue of a vessel in marine peril. See id. at 1515 (describing elements of a salvage award claim); Norris, supra, § 2. Champlin's past endeavors appear to satisfy these general criteria; the TBD-1 has been in a state of marine peril since he learned of its location, Champlin's efforts to recover the plane have not been based on a legal duty or contractual obligation, and Champlin has taken constructive steps toward the ultimate preservation of the aircraft.

Whether IAR is eligible for a salvage award for Champlin's efforts obtaining the location of the submerged TBD-1, videotaping the wreck, and returning the plane's canopy and radio mast to dry land depends on when the United States rejected the salvage efforts of Champlin and

his companies. The record contains evidence of objections by the United States to Champlin's efforts stretching back to at least 1993.[18] Furthermore, some courts have entertained the possibility that laws regulating the use of public property could provide a "constructive rejection" of salvage of publicly owned vessels. See Lathrop, 817 F.Supp. at 964; cf. Platoro, 695 F.2d at 902. On the other hand, IAR maintains that Champlin negotiated with the Navy about trading the TBD-1 torpedo bomber for vintage aircraft already in the government's possession, and some evidence in the record might indicate that the Navy at times acquiesced to Champlin's salvage efforts.[19] We remand for the district court to consider when the United States effectively rejected the salvage efforts of IAR and its predecessors-in-interest, and to calculate a salvage award, if appropriate, for their past efforts.

III. CONCLUSION.

We REVERSE the district court order permitting IAR to continue salvage operations on the in rem defendant aircraft, the TBD-1, and we REMAND for further proceedings consistent with this decision.

---

18. See Letter from W.S. Dudley, Director of Naval History, United States Navy, to Douglas L. Champlin, President, Historic Aircraft Recovery, Inc. (Nov. 17, 1998), in R1, Tab 12, Ex. 6; Letter from Damon Miller, Trial Attorney, Department of Justice, to David Paul Horan (Feb. 9, 1995), in R1, Tab 12, Ex. 8; Letter from J. Bernard Murphy, Federal Preservation Officer, United States Navy, to Milan G.W. Slahor (June 25, 1993), in R1, Tab 12, Ex. 7.

19. See Facsimile from Douglas L. Champlin to Capt. R.L. Rasmussen, Director, National Museum of Naval Aviation (July 26, 1995), in R1, Tab 18, Ex. G.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED JULY 8, 1999

United States District Court,
S.D. Florida.

INTERNATIONAL AIRCRAFT RECOVERY, L.L.C.
a Nevada Limited Liability Company,

Plaintiff,

v.

THE UNIDENTIFIED, WRECKED AND ABANDONED AIRCRAFT, her armament, apparel, and cargo located within one (1) marine league of a point located at 2543'4" N Latitude and 802'8" W Longitude,

Defendant.

and

United States of America,

Intervenor,

No. 98-1637-Civ.

July 8, 1999.

* * *

Appendix B

OPINION

JAMES LAWRENCE KING, District Judge.

This case arises on cross motions for summary judgment, as an In Rem admiralty action involving the salvage of an extremely rare and historic aircraft that crashed in waters beyond the territorial limits of the United States 56 years ago last week, on July 1st, 1943. Intervenor United States of America asserts that the United States Navy is the owner of the In Rem Defendant aircraft and disputes In Rem jurisdiction over the Defendant property. The Plaintiff/Salvor claims rights and/or ownership of the In Rem Defendant aircraft in admiralty, asserting the "Law of Finds" and, alternatively, the "Law of Salvage". Plaintiff has taken possession of the In Rem Defendant aircraft that has been lost and abandoned for over a half century. Further, Plaintiff asserts that the In Rem Defendant aircraft was, and is, in a condition of maritime peril. The Intervenor, United States, defends on the issue that the In Rem Defendant aircraft has never been lost, abandoned, or in maritime peril.

The evidence before the Court consists of: Plaintiff's Verified Complaint, the June 23rd, 1998 Affidavit and May 25th, 1999 deposition of Douglas Champlin, President of Historic Aircraft Recovery, Inc., a Nevada corporation (the Managing Member of the Plaintiff International Aircraft Recovery, L.L.C., a Limited Liability Company); the February 9th, 1999 Affidavit and April 22nd, 1999 deposition of Dr. William S. Dudley, the Director of Naval History and Director of the Naval Historical Center in Washington, D.C.; the February 12th, 1999 Affidavit and May 24, 1999

deposition of Captain Robert L. Rasmussen, the Director of the National Museum of Naval Aviation in Pensacola, Florida; the May 24th, 1999 deposition of Robert "Buddy" Macon, the Deputy Director and Curator of the National Museum of Naval Aviation; and the testimony of the witnesses and exhibits from the June 4th, 1999 hearing. Final legal argument of counsel, on the cross motions for final summary judgment were head June 14, 1999.

The Court has viewed all of the evidence in a light most favorable to the Intervenor United States. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In ruling for the Plaintiff, the Court has resolved all reasonable doubts about the facts in favor of the Intervenor and has drawn all justifiable inferences in the Intervenor's favor. United States v. Four Parcels of Real Property, 941 F.2d 1428, 1437 (11 Cir.1991). The Court finds that no material fact remains in dispute, and that the Plaintiff International Aircraft Recovery, LLC, is entitled to Summary Final Judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

HISTORICAL INTRODUCTION

On April 14th, 1938, the Douglas Aircraft Company delivered TBD-1, Bureau of Naval Operations No. (Buno #) 0353 to the United States Navy. It was accepted by the Naval Air Station in Pensacola, Florida sixty-one (61) years ago, on May 3rd, 1938. From 1938 until mid-1941, Buno # 0353 was on "Neutrality Patrol" in the central Atlantic. In July, 1941, with a prospect of the United States entering the World War becoming more and more certain, the aircraft was

assigned to Torpedo Squadron Five, aboard the Aircraft Carrier "Yorktown" operating in the Pacific theater. During the next two (2) years, TBD-1 Buno # 0353 (along with other TBD-squadrons) was instrumental in turning the tide of war against the Japanese in both the "Battle of Midway" and the "Battle of the Coral Sea".

TBD-1 Buno # 0353 survived its involvement in these historic battles. During the "Battle of Midway", one TBD Squadron (VT-8) was entirely destroyed and another decimated when intercepted by Japanese Zero fighters. On the 7th and 8th of May, 1942, the Buno # 0353 participated in the "Battle of the Coral Sea". On May 7th, the TBD-1's and dive-bombers from the "Yorktown", attacked and sank the Japanese Aircraft Carrier, "Shoho". On May 8th, they attacked and heavily damaged the Japanese Aircraft Carrier "Shokaku". On these flights, TBD-1 Buno # 0353 was piloted by Ensign Francis R. Sanborn. On May 8th, while engaged in the attack on the Japanese Fleet, the "Yorktown" and the United States Aircraft Carrier "Lexington", were attacked by Japanese aircraft. The "Lexington" was damaged so badly she was later sunk to avoid capture. The "Yorktown's" repair parties controlled her damage sufficiently to enable her to recover many of her aircraft. TBD-1 Buno # 0353 was one of the planes that returned safely to Yorktown.

The aircraft returned for overhaul to Naval Air Station San Diego, from July until September, 1942 and then was assigned to the Atlantic Training Squadron at the Naval Air Station in Miami, Florida.

Ensign Bruce T. Mallory, while conducting a torpedo attack instruction flight on July 1, 1943, in the subject TBD-1,

commenced having mechanical difficulties. During the flight, the aircraft's variable-pitch propeller malfunctioned and the aircraft was unable to sustain flight. Ensign Mallory crash landed the aircraft into the Atlantic Ocean in deep international waters, approximately eight (8) miles east of Miami Beach, Florida, where he and his crew escaped without injury.

On or about September 8th, 1943, the Naval Aircraft Records for TBD-1 Buno # 0353 were stamped, in two places, with the word "Stricken". On July 24th, 1944, the Chief of Naval Operations sent an "Aviation Circular" to all ships, stations and units concerned with Naval Aircraft. The subject was "Aircraft — Striking and Disposition of." The Aviation Circular was signed by Admiral John S. McCain, the Deputy Chief of Naval Operations (Air). Admiral McCain's directive fifty-five years ago, was non-discretionary in its recommendation that all crashed aircraft be stricken. The Admiral also ordered the striking of any aircraft that had completed its service life and directed that salvage begin on those aircraft. Provision was made for determining whether aircraft unable to return to the U.S. should be declared stricken. The availability of replacement aircraft and an evaluation of the condition of the individual aircraft were to be considered in making this determination. Once stricken, salvage operations were to begin for these aircraft as well, pursuant to Admiral McCain's orders.

All TBD-1's known to exist were stricken, destroyed or lost by the Navy at some time following the Second World War. The location of TBD-1 Buno # 0353 was lost for nearly half a century, "Stricken" from the Naval records.

Appendix B

In 1990, a group of salvors searching for Spanish galleons, located the wrecksite of a TBD-1. Using a remote operated vehicle (ROV), a videotape was produced showing the condition of the aircraft after years of exposure to a saltwater (highly corrosive) environment. After determining that the aircraft they had discovered in deep waters beyond the territorial limits of the United States was (at that time) the only TBD-1 known to exist, the salvors attempted to sell the video tape and location of the rare aircraft to the National Museum of Naval Aviation (NMNA) in Pensacola, Florida, for the sum of $25,000.00. Since the NMNA had no budget for such acquisition, the purchase was refused.

Within a few months, Douglas Champlin, a collector of fighter aircraft from around the world and owner of "Fighter Aces Museum" in Mesa, Arizona, purchased the location of the TBD-1 and video tape for the sum of $75,000.00 Dollars. Mr. Champlin researched the location and history of the aircraft and discovered Buno # 0353's historic past. For several years, Douglas Champlin offered to enter into an agreement with the National Museum of Naval Aviation whereby Mr. Champlin would recover the TBD-1 in return for the trade of one or more surplus government owned fighter aircraft. Since purchasing the location and 1990 video, Douglas Champlin has conducted two salvage expeditions to the wrecksite of the In Rem Defendant aircraft. The first salvage expedition in December, 1994, was undertaken after discussions with Robert Macon, the NMNA Deputy Director. During this salvage expedition, a portion of the canopy of the TBD-1 Buno # 0353 was recovered and an additional videotape confirming the condition of the aircraft was made. This video confirmed that during the past five (5) years, the

engine of the aircraft had dislocated from the frame and had started falling forward. In 1998, there was another salvage expedition, which produced another videotape, and the radio mast of the TBD was recovered. These salvage expeditions to the wrecksite provided information that was used by Douglas Champlin and his contractor, Robert Mester, to design and build a special cradle for the safe recovery of the aircraft. To date the Plaintiff International Aircraft Recovery and its predecessors in interest (Mr. Champlin) have invested over $130,000.00 in the salvage of the In Rem Defendant aircraft.

No other official action was taken by the United States Navy regarding TBD-1 Buno # 0353 until August 27, 1998. On that date, pursuant to a request from the National Museum of Naval Aviation (NMNA), the Commander of Naval Inventory Control Point entered an "Assignment" purporting to assign TBD-1 Buno # 0353 to the National Museum of Naval Aviation "for salvage and eventual static display". This assignment occurred after Plaintiff in this case filed an In Rem salvage complaint in United States District Court for the Southern District of Florida.

Dr. Dudley, the Director of the Naval Historical Center, Washington, D.C., Captain Rasmussen and Mr. Robert Macon, the Director and Assistant Director of the National Museum of Naval Aviation at Pensacola, Florida, all testified that there is no budget or any funding for locating and recovering historic aircraft from a water environment. These experts are unanimous in their opinion that TBD-1 Buno # 0353, located in deep international waters east of Miami Beach, Florida is one of the rarest and most historic military aircraft still in existence.

Appendix B

PROCEDURAL HISTORY OF THE CASE

This case is the second time TBD-1 Buno # 0353 has appeared before this Court as an In Rem Defendant. In 1994, the Assistant Director of the National Museum of Naval Aviation, Robert Macon, conferred with Douglas Champlin and Champlin's agent, Robert Mester, with regard to providing some protection from damage to the plane or the wrecksite of the aircraft from third parties. Macon, Champlin and Mester also conferred regarding the recovery of a piece of the aircraft to ascertain its condition as it related to the aircraft's recovery and restoration.

In August of 1994 Douglas Champlin as President of Windward Aviation, Inc., an Oklahoma corporation d/b/a Champlin Fighter Museum filed an In Rem action in this Court under Case No. 94-1775-Civ-Ungaro-Benages. Soon thereafter, a salvage expedition was mobilized to recover a portion of the TBD and to take additional video of the wrecksite for purpose of the final planning of the recovery and restoration of the In Rem Defendant aircraft. On February 14th, 1995, an Amended Complaint was filed in the Windward Aviation action, clarifying that Plaintiff's salvage action had been filed to protect the TBD against third parties and that it was Mr. Champlin's intent that the In Rem Defendant aircraft, when recovered, would be placed in the National Museum of Naval Aviation in Pensacola, Florida.

On March 2nd, 1995, the Windward Aviation In Rem action was dismissed and the portion of the canopy recovered by Mr. Champlin in 1995 was delivered to the NMNA in Pensacola, Florida.

Appendix B

Three and a half years after the dismissal of the Windward Aviation In Rem action, the present In Rem action was filed. The Verified Complaint was accompanied by Mr. Champlin's Affidavit in Support of the request that the Plaintiff/Salvor be appointed as this Court's Substitute Custodian for the In Rem Defendant aircraft. On July 21st, 1998, the Court entered its Order Appointing the Plaintiff/ Salvor International Aircraft Recovery, LLC as the Court's Substitute Custodian. On November 2nd, a copy of a videotape of the 1998 salvage expedition to the wrecksite was sent to the Court as part of a Salvage Report. Because the Court's Order directing the issuance of the Warrant for Arrest In Rem had expired under the Local Rules, the Plaintiff/Salvor/Substitute Custodian filed a December 24th, 1998 Motion to Renew the In Rem Warrant. On December 30th, 1998, the United States moved to Intervenc, to vacate the prior Court Orders pertaining to the In Rem arrest, to enjoin the Plaintiff from further salvage operations and for an Order requiring the return of any salvaged parts of the In Rem Defendant to the United States.

On January 26th, 1998, the Court entered its Order Renewing the Warrant of Arrest In Rem and on February 7th, 1999, the Plaintiff International Aircraft Recovery stipulated to the United State's intervention, responded to the Intervenor's Motions and defenses, answered the Intervenor's Counter-Claim and moved for Summary Judgment. On February 12th, the Intervenor United States replied to the Plaintiff International Aircraft Recovery, LLC's Motion for Summary Judgment and the Intervenor filed a Cross-Motion for Summary Judgment. On February 25th, 1999, the radio mast of the In Rem Defendant aircraft

(recovered during the 1998 salvage expedition) was processed under the Court's In Rem Arrest Warrant and the United States Marshal's Property Return was filed with the Court.

Immediately upon the return of the In Rem Warrant, the Intervenor filed a document entitled, "Claim of the United States as Owner of the Defendant Aircraft and Contents". On March 4th, 1999, the Court entered an Order setting pretrial conference for June 4th, 1999 and trial on June 24th, 1999. March 16th, the Plaintiff/Salvor filed its "Notice of Action In Rem and Arrest of Vessel" and response to the Intervenor's Cross-Motion for Summary Judgment.

April 29th, 1999, the Intervenor filed a Motion for a Temporary Restraining Order and/or Preliminary Injunction and a Motion for Emergency Hearing. Due to a stipulation between the parties that no salvage expedition would be mobilized prior to the June 4th, 1999 pretrial conference, a hearing on all pending Motions was set for that time.

As of the June 4th, 1999 hearing on all pending Motions, the procedural status of the case was very similar to the July 1981 procedural status of the case in Cobb Coin Company, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel, 525 F.Supp. 186 (S.D.Fla.1981).[1] In that case, on July 7th, 1981, after an emergency hearing involving a counterclaim by the State of Florida requesting that it be

1. Coincidentally, a case with which this Judge is very familiar since he was also the presiding judge and author of the opinion of Cobb Coin in 1981.

declared the owner of the vessel and requesting an Order requiring the return to the State of the items salvaged by the Plaintiff, the Court entered an extensive Temporary Restraining Order and later a Preliminary Injunction. Cobb Coin, 525 F.Supp. at 190.

In these proceedings, as in Cobb Coin, the Court is fully cognizant of the Intervenor's legitimate interests in the preservation of what it considers to be a historical/ archaeological treasure belonging to the United States. In Cobb Coin, and in these proceedings, the Court set the case for an immediate final hearing. In so doing, the Court followed the procedure established by the Fifth Circuit Court of Appeals in Treasure Salvors v. The Unidentified Wrecked and Abandoned Sailing Vessel, 640 F.2d 560 (5 Cir.1981). As to the claim of the United States in Treasure Salvors, and in these proceedings, there is no dispute as to any of the material facts that support this Summary Final Judgment.

THE THRESHOLD DETERMINATION: THE BASIS OF JURISDICTION

Intervenor, United States of America, questions the Court's admiralty jurisdiction and raises issues of whether the In Rem Defendant aircraft was "abandoned" property or became a "derelict". The Court's analysis of whether the aircraft was abandoned appears later in this Opinion.

The legal basis of the Court's exclusive jurisdiction is Article III, Section 2, Clause 1 of the United States Constitution, testing judicial power of Federal Courts . . . "to all cases of admiralty and maritime jurisdiction."

Appendix B

The salvage of items from navigable waters, both within and without the United States, constitutes the core of the exclusive admiralty and maritime jurisdiction of United States District Courts. In Houseman v. O'Hara, 40 U.S. 40, 15 Pet. 40, 10 L.Ed. 653 (1841), the United States Supreme Court held, "The admiralty court is the only court where such a question [of salvage] can be tried; for what other court, but a court of admiralty has jurisdiction to try a case of salvage?" Id. at 48.

During the last twenty years, the United States Supreme Court has decided two cases involving In Rem salvage actions: Florida Department of State v. Treasure Salvors, Inc., 458 U.S. 670, 102 S.Ct. 3304, 73 L.Ed.2d 1057 (1982); and California v. Deep Sea Research, 523 U.S. 491, 118 S.Ct. 1464, 149 L.Ed.2d 626 (1998). Treasure Salvors produced three Opinions with the plurality holding that the salvor owned the salvage and was entitled to continue salvage, but that the admiralty courts did not have the power to adjudicate the State's interest in salvaged property without the State's consent. 458 U.S. at 711, 102 S.Ct. 3304. Deep Sea Research was a unanimous Opinion of all nine Justices. The Court revisited its decision in Treasure Salvors and clarified jurisdiction of Article III Courts in In Rem salvage actions. Justice O'Conner, writing for a unanimous court, pointed out that Deep Sea Research was a decision determining the federal court's In Rem jurisdiction where an official of the state, the federal government or a foreign government appears in an In Rem action and asserts ownership of the res (118 S.Ct. at 1472) and said: "It is true that statements in the fractured Opinions in Treasure Salvors might be read to suggest that a federal court may not undertake In Rem

adjudication of the state's interest in property without the state's consent, regardless of the status of the res."

The opinion went on to hold that all cases involving claims by the state, the federal government or a foreign government, involving the In Rem Defendant in a salvage action will be determined on the basis of whether the intervening sovereign was making a claim that the res was in it's actual possession, drawing on two earlier decisions of the Supreme Court, "The Siren " and "The Davis". In The Siren, 7 Wall. 152, 74 U.S. 152, 159, 19 L.Ed. 129 (1868), the Court held that if a vessel was in the actual possession of the United States, it would be exempt from a direct In Rem proceeding. A year later, in The Davis, 10 Wall. 15, 77 U.S. 15, 19 L.Ed. 875 (1869), the Supreme Court held that where property of the United States was involved, the only time an In Rem proceeding would be forbidden would be in a situation where the actual . . . "possession of the United States must be invaded under process of the Court." Id. 77 U.S. at 20. In "The Davis" and in last year's unanimous Opinion in Deep Sea Research, the Court held that the "possession" requirement was . . . "an actual possession, and not the mere constructive possession which is very often implied by reason of ownership under circumstances favorable to such implication." "The Davis", 77 U.S. at 21. Deep Sea Research, 118 S.Ct. at 1473.

Justice O'Conner, in explaining the exclusive In Rem jurisdiction of the Federal Admiralty Courts, quoted two decisions in 1809 by Justices Story and Washington for the proposition that . . . "In cases of admiralty and maritime jurisdiction, the property in dispute is generally in the

possession of the Court, or of persons bound to produce it, or its equivalent, and the proceedings are In Rem. The Court decides in whom the right is, and distributes the proceeds accordingly." Deep Sea Research, 118 S.Ct. at 1470.

There were four (4) "concurring" Opinions to Justice O'Conner's unanimous Opinion in Deep Sea Research. Justice Stevens, who had written the plurality Opinion in Treasure Salvors explained the mistake made by both the four (4) members of the plurality and the four (4) dissenters in Treasure Salvors. Justice Stevens, in his concurring Opinion stated, "I believe that both Opinions [plurality and dissent] made the mistake of assuming that the Eleventh Amendment has the same application to an In Rem admiralty action as to any other action seeking possession of property in the control of state officers." Deep Sea Research, 118 S.Ct. at 1474. He concluded by stating, "Having given further consideration to the special characteristics of In Rem admiralty actions, and more particularly to the statements by Justice Story and Justice Washington quoted at pages 9 and 10 of the Court's Opinion, I am now convinced that we should have affirmed the Treasure Salvors' judgment in its entirety." Id. at 1474. Justices Kennedy, Ginsberg and Breyer also entered concurring Opinions in Deep Sea Research indicating that . . . "It ought to be evident" . . . that the issue of a Federal Court's In Rem jurisdiction even over an In Rem Defendant in the state's possession is "open to reconsideration". Id. at 1474.

Based upon last year's Supreme Court decision governing all In Rem admiralty actions involving In Rem Defendants in which an official of a state, the federal

government or foreign government asserts ownership, without actual possession, this Court now holds that the salvage services advanced by the Plaintiff/Salvor International Aircraft Recovery, LLC., and its predecessors in interest, constitute a valid maritime lien against the In Rem Defendant. The Intervenor United States admits that it is not in possession or control of the In Rem Defendant.

This Court holds that the Plaintiff's federal salvage rights and remedies are in full force and effect and that the Plaintiff has been, and is, ably engaged in successfully returning to the people of this country, a historic aircraft which otherwise would remain lost beneath the sea.

ABANDONMENT

Justice O'Conner, speaking for a unanimous United States Supreme Court in California v. Deep Sea Research, 523 U.S. 491, 118 S.Ct. 1464, 149 L.Ed.2d 626, quoting the Court of Appeals for the Ninth Circuit said:

> "As to the specifics of the State's claim under the ASA, the court held that the District Court did not err in concluding that the State failed to prove that the Brother Jonathan is abandoned within the meaning of the statute. The court reasoned that, in the absence of a definition of abandonment in the ASA, 'Congress presumably intended that courts apply the definition of abandonment that has evolved under maritime law.' Ibid. In maritime law, the court explained, abandonment occurs either when title to a vessel has been

affirmatively renounced or when circumstances give rise to an inference of abandonment."

Further, at p. 389 of the opinion, she said:

"There remains the issue whether the courts below properly concluded that the Brother Jonathan was not abandoned for purposes of the ASA. That conclusion was necessarily influenced by the assumption that the Eleventh Amendment was relevant to the courts' inquiry. The Court of Appeals' determination that the wreck and its contents are not abandoned for purposes of the ASA was affected by concerns that if 'the vessel had been partially abandoned, both the federal court and the state court would be adjudicating the fate of the Brother Jonathan.' 102 F.3d, at 389. Moreover, the District Court's inquiry was a preliminary one, based on the concern that it was premature 'for the court to find that any individual items of cargo or personal property have been abandoned.' 883 F.Supp., at 1354. In light of our ruling that the Eleventh Amendment does not bar complete adjudication of the competing claims to the Brother Jonathan in federal court, the application of the ASA must be reevaluated. Because the record before this Court is limited to the preliminary issues before the District Court, we decline to resolve whether the Brother Jonathan is abandoned within the meaning of the ASA. We leave that issue for reconsideration on remand, with the clarification that the meaning

of 'abandoned' under the ASA conforms with its meaning under admiralty law."[2]

Abandonment under admiralty law has been construed by the Supreme Court on a number of occasions. In Cromwell v. Bark Island City, 66 U.S. 121, 1 Black 121, 17 L.Ed. 70 (1861), the Court held that a vessel was abandoned if those in charge had departed without hope of, or intent to, return to her. The Court held that such a vessel was termed a "derelict" and that voluntary salvors were entitled to salvage compensation if they were successful, in whole or in part, in saving the imperiled vessel. In "The Laura", 14 Wall. 336, 81 U.S. 336, 20 L.Ed. 813 (1871), the Court held that where a vessel was in danger of being lost so far as any timely effort to save her was contemplated, the vessel was open to a voluntary salvor acting in good faith with reasonable judgment and skill and that salvage services could not be "refused". In this case, there is no dispute of the material fact that the In Rem Defendant has nested undisturbed, on the bottom of the ocean for over half a century. The United States Navy had no hope or expectation of ever recovering the plane. The location of the In Rem Defendant was unknown and she was lost to a watery grave. Soon after it's loss, the Navy repeatedly marked the records as "Stricken", indicating the Navy's abandonment of the TBD.

---

2. Of course, there is no issue of partial abandonment in the case at bar, since it is agreed that the aircraft involved in this case is a single object. The foregoing discussion of abandonment by the United States Supreme Court in its unanimous opinion is, however, instructive.

Appendix B

The Director of the Naval Historical Center and the Director and Assistant Director of the National Museum of Naval Aviation all confirm that the Intervenor United States has no funding to mount any timely effort to save the TBD, or even the ability of NMNA to trade government owned surplus aircraft in return for salvage services.

In The # 105 Belcher Oil Company v. Griffin, 97 F.2d 425, 426 (5 Cir.1938), the Court held that in order to be entitled to ownership under the "Law of Finds", a vessel must have been abandoned by its previous owner. The Court stated, "Dereliction or renunciation of property requires both the intent to abandon and an external action . . . there must be a voluntary intention to abandon, or evidence from which such intention may be presumed."

In this case, there is no dispute that after the July 1943 loss of the aircraft, the only affirmative action taken by the Intervenor United States for the next half century was to mark the aircraft records as "Stricken". Approximately ten years ago, the location and a video tape of the abandoned and derelict aircraft was offered to the National Museum of Naval Aviation for the sum of Twenty-five Thousand Dollars. Thereafter, despite knowledge of the existence of this rare and historic TBD (the only known TBD in existence), the Intervenor United States, refused help to the abandoned and derelict aircraft that it now claims. The Intervenor's refusal was largely based on lack of congressional funding for salvage of historic ships and planes. Nevertheless, it is clear that the Intervenor has, for at least the last ten years, been unable or unwilling to rescue the TBD.

Appendix B

The Plaintiff/Salvor or its predecessors in interest, including Douglas Champlin, have performed voluntary salvage services so that the abandoned derelict aircraft can be salvaged, preserved and restored and displayed to the American public as the only surviving example of a rare and equally historic aircraft. There are three video tapes, a portion of the canopy and a radio mast that show success, in whole or in part, with regard to ongoing salvage for the purpose of having this Court protect the Plaintiff's valid federal salvage rights.

As set forth above, the issue of abandonment and ownership are secondary to the question of whether this Court can protect the Plaintiff's ongoing federal salvage rights as to the In Rem Defendant aircraft. Even were the Court to hold that the Intervenor United States was the owner (which it does not) the Plaintiff would continue to have an ongoing right to finish providing the salvage services which they have already started. The Plaintiff/Salvor has spent approximately $130,000.00 on salvage operations to date. This expense was incurred in locating and filming the wrecksite (for purposes of building the cradle and planning the final salvage expedition) and recovering a portion of the canopy and radio mast.

The Intervenor United States' legal argument relies, in part, upon Protection Company v. The Charles P. Chouteau, 5 F.Rep. 463, where aid tendered to a burning vessel was absolutely declined. By the late 1800's, however, the right of an owner or Captain to refuse salvage assistance to a vessel in maritime peril was relegated to instances where the vessel was not then in any maritime peril. The Intervenor

Appendix B

United States has no adequate measures or funding by which rescue can be provided to the In Rem Defendant. Therefore, even if the Court were to hold that the United States owns the aircraft, refusal of salvage could not be allowed. The services of a voluntary salvor will be allowed . . . "if a prudent man would have accepted" . . . Merritt and Chapman Derrick and Wrecking Co. v. United States, 274 U.S. 611, 47 S.Ct. 663, 71 L.Ed. 1232 (1927). In Tidewater Salvage v. Weyerhaeuser, 633 F.2d 1304, 1306, 1307 (9 Cir.1980), the Court held that an owner could refuse salvage if he was . . . "acting as a prudent person . . .". Numerous cases hold that an owner may not refuse salvage services if no other provision for rescue has been made and maritime peril exists. Spreckels v. California, 45 F. 647 (N.D.Cal.1890); Manchester Brigade v. United States, 276 F. 410 (E.D.Va. 1921); Hamburg-American Line v. United States, 168 F.2d 47 (1 Cir.1948).

The legal argument of the Intervenor United States on abandonment of TBD-1 Buno # 0353 is based upon the assertion that such abandonment did not occur under the provisions of the Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 471 et. seq. That Act provides that the government may authorize the abandonment of property which has no commercial value or of which the estimated cost of continued care and handling would exceed proceeds of sale. The Intervenor argues that the statutory language allows, but does not mandate, abandonment of government property under certain conditions.

The Intervenor is correct in observing that the word "may" denotes a discretionary, not mandatory, act. However,

whether the In Rem Defendant aircraft was abandoned as a discretionary act under the 1949 legislation is irrelevant with regard to the July 1st, 1943 crash and disposition of the In Rem Defendant. When Congress passed the Surplus Property Act of 1944, 50 U.S.C. § 1611, it used the non-discretionary mandatory word "shall" when directing the disposition of non-flyable, commercially unsalable aircraft. The only exception to the disposition of such aircraft was "unless other disposition is directed by the disposing agency". In 1944, the statutes and regulations relative to striking and disposition of government property were mandatory, not discretionary. Five (5) years later, when the Federal Property and Administrative Services of Act of 1949 was passed, the only non-flyable, non-sellable aircraft then in existence were those in which some other disposition had already been directed by the disposing agency, as in Admiral McCain's "Aviation Circular."

Because this case can be adjudicated without construing the 1949 discretionary "abandonment" language, the Court will leave that issue to another day and some other In Rem Defendant aircraft that may have been flyable and/or sellable in 1949.

SALVAGE OF HISTORIC AIRCRAFT

In the case at bar, all the parties have assisted in documenting the historical information concerning the In Rem Defendant aircraft. It is obviously important to carry out the recovery of ancient shipwrecks and historic aircraft in such a way so as to protect the In Rem Defendant from additional damage due to the recovery operation itself.

Appendix B

In Cobb Coin Company, Inc., v. The Unidentified, Wrecked and Abandoned Sailing Vessel, 549 F.Supp. 540 (S.D.Fla.1982),[3] this Court held that in order to state a claim for a salvage award on an ancient vessel of historical and archaeological significance, it was essential that the salvors document to the Admiralty Court's satisfaction that the historical and archaeological provenience of the In Rem Defendant was documented and preserved. The Court stated, "To leave this element merely for consideration of a salvage awarded would not provide, perforce, sufficient incentive to salvors to insure that the information is obtained. Accordingly, however, this Court holds that by meeting the threshold requirement, a salvor simultaneously 'enhances' the value of his recovery in such a way as will be explicitly recognized by the Court in the determination of the salvage award." Id. at 559.

In carrying out the Admiralty Court's responsibility to return to present day use, those objects abandoned, lost or in maritime peril, this Court now holds that in order to state a claim for a salvage award on a historic aircraft, it is an essential element that the salvors document to the Admiralty Court's satisfaction that they have made adequate provision, and have the funding necessary, to recover the aircraft in such a way as to minimize further damage to the In Rem Defendant because of the recovery operation. Further, the salvor must make adequate provisions for the stabilization and preservation of the remains of the historic aircraft after recovery.

---

3. Again, coincidentally an opinion authored by the undersigned Judge.

Appendix B

THE INTERVENOR UNITED STATES' FUTURE ROLE IN IN REM SALVAGE PROCEEDINGS INVOLVING HISTORIC AIRCRAFT

Nearly seventeen (17) years ago, in its Cobb Coin decision, this Court held that although the State of Florida did not own the artifacts being salvaged, the Court would recognize the State "as trustee for the people" for the purpose of exhibiting some of the salvaged property for the people's benefit. In Cobb Coin, 549 F.Supp. at 562, the Court allowed a state agency to intervene in future salvage award determinations, "to assert an interest on behalf of its citizenry to particular artifacts recovered which are not represented in its present inventory and which it feels are essential to the preservation of the people's heritage." As in Cobb Coin, this Court now holds that the Intervenor UNITED STATES may intervene and request that the In Rem Defendant aircraft TBD-1 Buno # 0353 be awarded to the National Museum of Naval Aviation in Pensacola, Florida. An historic warplane of this type is not represented in the Museum's present inventory. The Plaintiff/Salvor and Intervenor agree that recovery and display of this aircraft is essential to the preservation of the people's heritage.

In the event the Court awards the salvaged remains of this historic aircraft to the National Museum of Naval Aviation, as Trustee for the People of the United States, the Court will determine a proper salvage award based upon the labor expended, the promptitude, skill and energy displayed, the value of the property employed by the salvors, the danger to which the property was exposed, the risk incurred by the salvors in securing the property from the impending peril,

the value of the property saved, and the degree of danger from which the property was rescued. See Cobb Coin, 525 F.Supp. at 207 and Norris, 3A "Benedict on Admiralty", The Law of Salvage, 7th Edition, Section 244.

Plaintiff International Aircraft Recovery, LLC is entitled to recover reasonable attorneys fees and the costs of these proceedings from the Intervenor United States. The attorney for the Plaintiff shall file Affidavits stating Plaintiff's requested fees and costs, including the number of hours worked, the billing rate applicable to each chargeable hour and the amount actually paid by the client. The Intervenor United States may respond by Affidavits within thirty days from service of Plaintiff's fee and cost Affidavit.

Accordingly, after a careful review of the record, the Court being otherwise fully advised in the premises, it is

ORDERED and ADJUDGED that Plaintiff's Motion for Summary Judgment be and the same is hereby GRANTED. The Intervenor's motion for summary judgment be, and the same is hereby, DENIED. Final Judgment be and the same is hereby, entered in favor of Plaintiff. The Court retains jurisdiction for the purpose of awarding title or a salvage award and enforcing other provisions of this Order.

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT IN *SEA HUNT, INCORPORATED v. THE UNIDENTIFIED SHIPWRECKED VESSEL OF VESSELS*, Nos. 99-2053 and 99-2036 DATED AND DECIDED JULY 21, 2000

United States Court of Appeals,
Fourth Circuit.

SEA HUNT, INCORPORATED,

Plaintiff-Appellee,

and

Commonwealth of Virginia,

Intervenor-Appellee,

v.

THE UNIDENTIFIED SHIPWRECKED VESSEL OR VESSELS, Their Apparel, Tackle, Appurtenances, and Cargo Located within Coordinates 38 Degrees 01' 36" North Latitude, 75 Degrees 14' 33" West Longitude; 37 Degrees 57' 21" North Latitude, 75 Degrees 13' 00" West Longitude; 38 Degrees 01' 36" North Latitude, 75 Degrees 13' 14" West Longitude; 37 Degrees 57' 33" North Latitude, 75 Degrees 17' 44" West Longitude and/or 37 Degrees 55' 00" North Latitude, 75 Degrees 19' 18" West Longitude; 37 Degrees 54' 09" North Latitude, 75 Degrees 17' 00" West Longitude; 37 Degrees 51' 21" North Latitude, 75 Degrees 18' 52" West Longitude; 37 Degrees 52' 20" North Latitude, 75 Degrees 21' 05" West Longitude, in rem,

Defendant,

Appendix C

Kingdom of Spain,

Claimant-Appellant,

and

Commonwealth of Virginia, ex rel William A. Pruitt, Commissioner of Marine Resources and Chairman of the Virginia Marine Resources Commission; Alpha Quest Corporation; Richard L. Cook, an individual resident of Ocean City, Maryland,

Claimants,

and

United States of America; Columbus-America Discovery Group; Salvors, Incorporated; Cobb Coin Company, Incorporated; Intersal, Incorporated; Enterprise Marine, Incorporated; Quicksilver, Incorporated; Deep Sea Research, Incorporated; State of North Carolina,

Amici Curiae.

Sea Hunt, Incorporated,

Plaintiff-Appellant,

and

Commonwealth of Virginia,

Intervenor-Plaintiff,

v.

Appendix C

The Unidentified Shipwrecked Vessel or Vessels, Their Apparel, Tackle, Appurtenances, and Cargo Located Within Coordinates 38 Degrees 01' 36" North Latitude, 75 Degrees 14' 33" West Longitude; 37 Degrees 57' 21" North Latitude, 75 Degrees 13' 00" West Longitude; 38 Degrees 01' 36" North Latitude, 75 Degrees 13' 14" West Longitude; 37 Degrees 57' 33" North Latitude, 75 Degrees 17' 44" West Longitude and/or 37 Degrees 55' 00" North Latitude, 75 Degrees 19' 18" West Longitude; 37 Degrees 54' 09" North Latitude, 75 Degrees 17' 00" West Longitude; 37 Degrees 51' 21" North Latitude, 75 Degrees 18' 52" West Longitude; 37 Degrees 52' 20" North Latitude, 75 Degrees 21' 05" West Longitude, in rem,

Defendant,

Kingdom of Spain,

Claimant-Appellee,

and

Commonwealth of Virginia, ex rel William A. Pruitt, Commissioner of Marine Resources and Chairman of the Virginia Marine Resources Commission; Alpha Quest Corporation; Richard L. Cook, an individual resident of Ocean City, Maryland,

Claimants,

and

Appendix C

United States of America; Columbus-America Discovery Group; Salvors, Incorporated; Cobb Coin Company, Incorporated; Intersal, Incorporated; Enterprise Marine, Incorporated; Quicksilver, Incorporated; Deep Sea Research, Incorporated; State of North Carolina,

Amici Curiae.

Nos. 99-2035, 99-2036.

Argued May 1, 2000
Decided July 21, 2000

* * *

Before WILKINSON, Chief Judge, and LUTTIG and MICHAEL, Circuit Judges.

Affirmed in part and reversed in part by published opinion. Chief Judge WILKINSON wrote the opinion, in which Judge LUTTIG and Judge MICHAEL joined.

OPINION

WILKINSON, Chief Judge:

This in rem admiralty action concerns the sovereign rights of the Kingdom of Spain to two of its Royal Naval vessels, LA GALGA and JUNO, which were lost off the shores of present-day Virginia in 1750 and 1802 respectively. Pursuant to the Abandoned Shipwreck Act of 1987 (ASA), 43 U.S.C. § 2101-06 (1994), Virginia has asserted ownership

over the shipwrecks and has issued Sea Hunt permits to conduct salvage operations and recover artifacts from the wrecks. These efforts resulted in the discovery of two wrecks believed to be LA GALGA and JUNO. Sea Hunt filed an in rem admiralty complaint, and the district court ordered an arrest of the shipwrecks, appointing Sea Hunt the exclusive salvor. Spain filed a verified claim asserting ownership over the shipwrecks. The district court found that Spain retained title to JUNO, but had expressly abandoned LA GALGA in the 1763 Definitive Treaty of Peace. See Sea Hunt, Inc. v. Unidentified, Shipwrecked Vessel or Vessels, 47 F.Supp.2d 678 (E.D.Va.1999). The district court also denied Sea Hunt a salvage award.

As sovereign vessels of Spain, LA GALGA and JUNO are covered by the 1902 Treaty of Friendship and General Relations between the United States and Spain. The reciprocal immunities established by this treaty are essential to protecting United States shipwrecks and military gravesites. Under the terms of this treaty, Spanish vessels, like those belonging to the United States, may only be abandoned by express acts. Sea Hunt cannot show by clear and convincing evidence that the Kingdom of Spain has expressly abandoned these ships in either the 1763 Treaty or the 1819 Treaty of Amity, Settlement and Limits, which ended the War of 1812. We therefore reverse the judgment of the district court with regard to LA GALGA, and affirm the judgment of the district court concerning JUNO and the denial of a salvage award.

Appendix C

I.

LA GALGA ("The Greyhound") was a fifty-gun frigate commissioned into the Spanish Navy in 1732. LA GALGA left Havana on its last voyage on August 18, 1750, in order to escort a convoy of merchant ships to Spain. It carried the Second Company of the Sixth Battalion of Spanish Marines, Spanish Royal property, and English military prisoners. On August 25, 1750, the convoy encountered a hurricane near Bermuda that scattered the ships and forced them westward toward the American coast. LA GALGA eventually sank off the coast of the Maryland/Virginia border. Most of the crew and passengers reached land safely. When Captain Daniel Houny attempted to salvage items from the wreck, he found that local residents had already begun looting the vessel. He secured the assistance of Governor Ogle of Maryland, but any further salvage efforts ended when a second storm came and broke up what was left of the ship. LA GALGA remained undisturbed until the recent salvage efforts by Sea Hunt.

The JUNO, a thirty-four gun frigate, entered the service of the Spanish Navy in 1790. On January 15, 1802, JUNO set sail from Veracruz bound for Spain. On board JUNO were the soldiers of the Third Battalion of the Regiment of Africa, their families, and various civilian officials. The JUNO was beset by a ferocious storm and began taking on water. It encountered the American schooner LA FAVORITA. The two ships sailed together trying to reach an American port before JUNO succumbed to her leaks. As JUNO continued to take on water, the Captain ordered his passengers and crew to begin transferring to LA FAVORITA. But only seven persons were able to transfer before the storm picked up and

JUNO was lost in a heavy fog. LA FAVORITA could come close enough only to hear the anguished cries for help as JUNO went under. At least 413 sailors, soldiers, and civilians perished in the sinking of JUNO. Spanish authorities ordered an investigation into the sinking, but the location of the wreck was not discovered until Sea Hunt's recent efforts.

The Commonwealth of Virginia has asserted ownership over LA GALGA and JUNO pursuant to the Abandoned Shipwreck Act of 1987 (ASA), 43 U.S.C. §§ 2101-06 (1994). The ASA gives states title to shipwrecks that are abandoned and are embedded in the submerged lands of a state. See id. § 2105(a) & (c). Sea Hunt is a maritime salvage company based in the Eastern Shore of Virginia. The Virginia Marine Resources Commission granted Sea Hunt permits to explore for shipwrecks off the Virginia coast and conduct salvage operations. Sea Hunt began to explore for shipwrecks within its permit areas and has spent about a million dollars in conducting remote sensing, survey, diving, and identification operations. Sea Hunt claims that its efforts have resulted in finding the remains of LA GALGA and JUNO.

To avoid interference with its operations, Sea Hunt initiated an in rem admiralty action against the two wrecks on March 11, 1998. Sea Hunt sought a declaratory judgment that the shipwrecked vessels "have never been subject to the sovereign prerogative of the Kingdom of Spain and [are] subject to admiralty's laws of abandonment and the law of finds," that "the Commonwealth of Virginia be adjudged the true, sole and exclusive owner of the Shipwrecked Vessel(s)," and that any items salvaged therefrom by Sea Hunt be distributed pursuant to the permits issued by Virginia. In

the alternative, Sea Hunt sought a liberal salvage award for its efforts. On March 12, 1998, the district court issued an order directing the arrest of the shipwrecked vessels and granting Sea Hunt exclusive rights of salvage until further notice. The court also directed Sea Hunt to send specific notice of the action to both the United States and to Spain.

In response, the United States moved to intervene and filed a verified claim on behalf of Spain. The district court found that the United States lacked authority to appear on behalf of Spain and granted Spain 90 days to refile a verified claim. See Sea Hunt, Inc. v. Unidentified, Shipwrecked Vessel or Vessels, 22 F.Supp.2d 521, 526 (E.D.Va.1998). Spain's verified claim stated that the Kingdom of Spain "was and still is the true and bona fide owner of the vessels JUNO and LA GALGA . . . and that title and ownership interest in said vessels has never been abandoned or relinquished or transferred by the Kingdom of Spain." Spain put forth affidavits and exhibits showing that at the time of their sinking both ships were serving as vessels of the Royal Navy, that both vessels are currently on the register of the Spanish Navy, and that transfer or abandonment of the vessels would require formal authorization by the government of Spain.

On April 27, 1999, the district court found that the express abandonment standard applied to these shipwrecks and that Spain had abandoned its claim to LA GALGA under Article XX of the 1763 Definitive Treaty of Peace between France, Great Britain and Spain. See Sea Hunt, Inc. v. Unidentified, Shipwrecked Vessel or Vessels, 47 F.Supp.2d 678, 690 (E.D.Va.1999). It further found that Spain did not expressly abandon JUNO in the 1819 Treaty ending the

conflict between Spain and the United States stemming from the War of 1812. See id. In a later decision the district court held that Sea Hunt could not rightfully claim a salvage award because Spain, as the acknowledged owner of JUNO, had expressly refused salvage services. The Kingdom of Spain now appeals the judgment concerning LA GALGA. The Commonwealth and Sea Hunt note a cross-appeal with regard to JUNO and the denial of a salvage award.

II.

In order for Virginia to acquire title to the shipwrecks and to issue salvage permits to Sea Hunt, these vessels must have been abandoned by Spain. Sea Hunt and the Commonwealth argue that the Abandoned Shipwreck Act requires application of an implied abandonment standard for shipwrecks in coastal waters, and that Spain has abandoned LA GALGA and JUNO. Because Spain has asserted an ownership claim to the shipwrecks, however, express abandonment is the governing standard. See Columbus-America Discovery Group v. Atlantic Mutual Ins. Co., 974 F.2d 450, 464-65 (4th Cir.1992). To adopt a lesser standard would not only go beyond what the ASA requires. It would also abrogate America's obligations to Spain under the 1902 Treaty of Friendship and General Relations.

A.

Under the ASA, the United States asserts title to any abandoned shipwreck that is on or embedded in the submerged lands of a State. See 43 U.S.C. § 2105(a). Title is then automatically transferred to the State in whose

submerged lands the shipwreck is located. See id. § 2105(c). "Submerged lands" for the purposes of the ASA includes coastal waters three miles from shore. Id. § 2102(f)(1), § 1301(a)(2). For a state to acquire title to a shipwreck it must be (1) abandoned and (2) on or embedded in the submerged lands of a state. Id. § 2105(a) & (c). It is undisputed that LA GALGA and JUNO are within Virginia's submerged lands. That, however, is not enough. We must address whether these frigates were abandoned by Spain. If the shipwrecks were abandoned, then Sea Hunt would have control over them in accordance with its state-issued permits.

The ASA does not define the critical term "abandoned." Nothing in the Act indicates, however, that implied abandonment should be the standard in a case such as this where a sovereign asserts ownership to its vessels. The Act states in its findings that "abandoned shipwrecks" are those "to which the owner has relinquished ownership rights with no retention." 43 U.S.C. § 2101(b). The statute thus provides that a shipwreck is abandoned only where the owner has relinquished ownership rights. When an owner comes before the court to assert his rights, relinquishment would be hard, if not impossible, to show. Requiring express abandonment where an owner makes a claim thus accords with the statutory text. Further, although the legislative history states that abandonment may be implied, it may be implied "as by an owner never asserting any control over or otherwise indicating his claim of possession." H.R.Rep. No. 100-514(I), at 2 (1988), reprinted in 1988 U.S.C.C.A.N. 365, 366. An owner who comes forward has definitely indicated his claim of possession, and in such a case abandonment cannot be implied.

Appendix C

The legislative history of the ASA suggests that sovereign vessels must be treated differently from privately owned ones. The House Report incorporates a State Department letter, which states, "the U.S. only abandons its sovereignty over, and title to, sunken U.S. warships by affirmative act; mere passage of time or lack of positive assertions of right are insufficient to establish such abandonment." H.R.Rep. No. 100-514(II), at 13 (1988), reprinted in 1988 U.S.C.C.A.N. at 381. The implications of this for other sovereign vessels is also underscored: "[T]he same presumption against abandonment will be accorded vessels within the U.S. territorial sea that, at the time of their sinking, were on the non-commercial service of another State." Id. Under the ASA, then, an implied abandonment standard would seem least defensible where, as here, a nation has stepped forward to assert ownership over its sovereign shipwrecks.

B.

Further, courts have held that the ASA "did not affect the meaning of 'abandoned,' which serves as a precondition for the invocation of the ASA's provisions." Fairport Int'l Exploration, Inc. v. Shipwrecked Vessel, 177 F.3d 491, 499 (6th Cir.1999). According to the Supreme Court, "the meaning of 'abandoned' under the ASA conforms with its meaning under admiralty law." California v. Deep Sea Research, Inc., 523 U.S. 491, 508, 118 S.Ct. 1464, 140 L.Ed.2d 626 (1998). The Supreme Court never suggested that by conferring title to the states the ASA somehow altered the traditional admiralty definition of abandonment. While the common law of admiralty must be developed consonant

with federal statutes, see American Dredging Co. v. Miller, 510 U.S. 443, 455, 114 S.Ct. 981, 127 L.Ed.2d 285 (1994), here the ASA has not altered the admiralty law background.

Under admiralty law, where an owner comes forward to assert ownership in a shipwreck, abandonment must be shown by express acts. See Columbus-America Discovery Group v. Atlantic Mutual Ins. Co., 974 F.2d 450 (4th Cir.1992). "[S]hould an owner appear in court and there be no evidence of an express abandonment," title to the shipwreck remains with the owner. Id. at 461. This principle reflects the long standing admiralty rule that when "articles are lost at sea the title of the owner in them remains." The Akaba, 54 F. 197, 200 (4th Cir.1893). When "a previous owner claims long lost property that was involuntarily taken from his control, the law is hesitant to find an abandonment." Columbus-America, 974 F.2d at 467-68; see also Fairport, 177 F.3d at 498; Hener v. United States, 525 F.Supp. 350, 356- 57 (S.D.N.Y.1981). An inference of abandonment is permitted, but only when no owner appears. See Columbus-America, 974 F.2d at 464-65 ("Should the property encompass an ancient and long lost shipwreck, a court may infer an abandonment. Such an inference would be improper, though, should a previous owner appear and assert his ownership interest. . . .").

Appellees point us to no case applying an implied abandonment standard where a sovereign owner has come forward to assert a claim to its property. Although Sea Hunt and the Commonwealth characterize the rule of Columbus-America as an anomaly, it reflects well-established admiralty law doctrine and existing case law. For instance, in Fairport

the Sixth Circuit adopted a test of "inferential abandonment." It emphasized, however, that there is a "uniform concern that courts impose a high burden on those who argue that an owner abandoned property that sank against his will." 177 F.3d at 499; see also id. at 500 ("Proof by inference still requires proof, not conjecture — a requirement bolstered by the exacting burden of proof admiralty law imposes on those who allege abandonment."). The Sixth Circuit also expressly limited its holding to "vessels formerly owned by private parties, and express[ed] no view as to the application of the express abandonment test to vessels initially owned by the United States." Id. at 500.

The First and Fifth Circuits have also never suggested that an implied abandonment standard would govern in a case involving a claim by an original owner to its property. See Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked and Abandoned Steam Vessel, 833 F.2d 1059, 1065 (1st Cir.1987) (emphasizing that "no person or firm appeared to assert any overall claim of ownership"); Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel, 640 F.2d 560, 567 (5th Cir.1981) (noting that "salvage of a vessel or goods at sea, even when the goods have been abandoned, does not divest the original owner of title or grant ownership rights to the salvor, except in extraordinary cases"). Appellees' attempts to glean a broad implied abandonment standard from circuit law overlooks one salient point — none of the cases they rely upon involved an original sovereign owner's claim to its shipwrecked vessels. To adopt an implied abandonment standard in this context would casually divest sovereigns of ships which sank against their will and to which they still lay claim.

C.

Finally, the express abandonment standard is required by Article X of the 1902 Treaty of Friendship and General Relations between the United States and Spain. Article X provides, "In cases of shipwreck, damages at sea, or forced putting in, each party shall afford to the vessels of the other . . . the same immunities which would have been granted to its own vessels in similar cases." Treaty of Friendship and General Relations, July 3, 1902, U.S.-Spain, 33 Stat. 2105. According to the United States Department of State, "this provision is unique" in that no other "friendship, commerce and navigation (FCN) treaty of the United States contains such a broadly worded provision applying to State ships entitled to sovereign immunity." Statement of Interest, U.S. Dep't of State, ¶ 13 (Dec. 18, 1998). This treaty requires that imperiled Spanish vessels shall receive the same immunities conferred upon similarly situated vessels of the United States.

United States vessels may only be abandoned by an express, unambiguous, and affirmative act. Article IV of the Constitution states, "Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3. From this it follows that the Constitution precludes a finding of implied abandonment of federal lands and property — dispositions of federal property require some congressional action. "[T]he United States cannot abandon its own property except by explicit acts." See United States v. Steinmetz, 973 F.2d 212, 222 (3d Cir.1992). The Supreme Court has emphasized that the

United States cannot be precluded from asserting its ownership rights by private property "principles similar to laches, estoppel or adverse possession." United States v. California, 332 U.S. 19, 39-40, 67 S.Ct. 1658, 91 L.Ed. 1889 (1947). The government "holds its interests here as elsewhere in trust for all the people," and thus cannot relinquish its property without express acts. Id. at 40, 67 S.Ct. 1658. The House Report for the ASA also relates the understanding that "U.S. warships and other public vessels . . . require an affirmative act of abandonment." H.R.Rep. No. 100-514(II), at 5 (1988), reprinted in 1988 U.S.C.C.A.N. at 374. Thus, one of the immunities granted to United States vessels is that they will not be considered abandoned without a clear and affirmative act by the government.

Under the terms of the 1902 Treaty, Spanish vessels can likewise be abandoned only by express renunciation. Both Spain and the United States agree that this treaty provision requires that in our territorial waters Spanish ships are to be accorded the same immunity as United States ships. They also agree that such immunity requires application of the express abandonment standard. "When the parties to a treaty both agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, we must, absent extraordinarily strong contrary evidence, defer to that interpretation." See Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 185, 102 S.Ct. 2374, 72 L.Ed.2d 765 (1982). We cannot therefore adopt an implied abandonment standard in the face of treaties and mutual understandings requiring express abandonment. Such a standard would supplant the textual framework of negotiated treaties with an unpredictable judicial exercise in weighing equities.

Appendix C

Applying the express abandonment standard to sovereign vessels also respects the legitimate interests of the executive branch. While the ASA confers title to abandoned shipwrecks to the states, it does not vitiate important national interests or undermine the well-established prerogatives of sovereign nations. Department of Interior advisory guidelines on the ASA state that a sovereign vessel that appears to have been abandoned "remains the property of the nation to which it belonged at the time of sinking unless that nation has taken formal action to abandon it or to transfer title to another party." 55 Fed.Reg. 50116, 50121 (1990). The State Department has likewise emphasized that its policy is "to recognize claims by foreign governments — such as in this case by the Government of Spain regarding the warships JUNO and LA GALGA — to ownership of foreign warships sunk in waters of the United States without being captured, and to recognize that title to such sunken warships is not lost absent express abandonment by the sovereign." Statement of Interest, U.S. Dep't of State, ¶ 9 (emphasis added). Further, the State Department notes, "U.S. domestic law is consistent with the customary international law rule that title to sunken warships may be abandoned only by an express act of abandonment." Id. ¶ 15.

In a case such as this, it is "not for the courts to deny an immunity which our government has seen fit to allow." Republic of Mexico v. Hoffman, 324 U.S. 30, 35, 65 S.Ct. 530, 89 L.Ed. 729 (1945) (involving an in rem admiralty action against foreign owned merchant vessel). Our Constitution charges the political branches with the conduct of foreign affairs. See Chicago & Southern Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 109-10, 68 S.Ct. 431,

92 L.Ed. 568 (1948). The express abandonment standard is regularly applied by the executive branch in dealing with foreign vessels. It is simply not for us to impose a looser standard that would interfere with this long standing political judgment in sensitive matters of international law.

III.

We now address whether there has been an express abandonment of LA GALGA.[1] The district court found that Spain had expressly abandoned LA GALGA in Article XX of the Treaty of 1763. See Sea Hunt, 47 F.Supp.2d at 690. This interpretation, however, contravenes the plain language of the 1763 Treaty. It also flies in the face of the understandings of Spain and Great Britain, the relevant parties to Article XX. It impairs as well the respect that international law accords Spain's claim of ownership with regard to its shipwrecks and the military grave sites that they contain.

A.

Sea Hunt and Virginia must demonstrate express abandonment by "clear and convincing evidence."

---

1. We affirm the district court's holding that JUNO was not expressly abandoned in the 1819 Treaty. Article II of that treaty transferred territory from Spain to the United States. But, as the district court noted, "Nothing in Article 2 implies that Spain has ceded anything other than territory and the structures erected on that territory." Sea Hunt, 47 F.Supp.2d at 690. We agree that Spain did not expressly abandon JUNO in the 1819 Treaty for the reasons stated by the district court. See id. at 690-91.

Columbus-America, 974 F.2d at 464; see also Fairport, 177 F.3d at 501; accord Falgout Bros., Inc. v. S/V Pangaea, 966 F.Supp. 1143, 1145 (S.D.Ala.1997); Hener, 525 F.Supp. at 357. This is a high burden and an "exacting standard." Fairport, 177 F.3d at 501. The district court found such clear and convincing evidence of an express abandonment in the 1763 Definitive Treaty of Peace between France, Great Britain, and Spain, which ended the Seven Years War and transferred most of Spain's territories in the new world to Great Britain. See Sea Hunt, 47 F.Supp.2d at 689 ("The sweeping language of Spain's cession in Article XX, together with the background of the complete change of sovereignty in the North American colonies, makes it unlikely that Spain intended to, or would have been allowed by Great Britain to maintain a claim of ownership over the wreck of LA GALGA . . . .").

We disagree with the district court's interpretation. Article XX of the 1763 Treaty provides:

> [H]is Catholick Majesty cedes and guaranties, in full right, to his Brittanic Majesty, Florida, with Fort St. Augustin, and the Bay of Pensacola, as well as all that Spain possesses on the continent of North America, to the East or to the South East of the river Mississippi. And, in general, every thing that depends on said countries and lands, with the sovereignty, property, possession, and all rights, acquired by treaties or otherwise. . . . [S]o that the Catholick King cedes and makes over the whole to the said King and to the Crown of Great Britain, and that in the most ample manner

> and form. . . . It is moreover stipulated, that his Catholick Majesty shall have power to cause all the effects that may belong to him, to be brought away, whether it be artillery or other things.

Definitive Treaty of Peace, Feb. 10, 1763, Fr.-Gr. Brit.-Spain, art. 20, Consol. T.S. 331-32.

The plain language of this treaty provision contains no evidence of an express abandonment. First, Article XX does not include any of the common nouns that could refer to LA GALGA. Notably absent are the terms "shipwreck," "vessels," "frigates," or "warships." Other provisions of the treaty mention these terms explicitly. For instance, Article III, which provides for the restoration of prisoners, states "all the ships of war and merchant vessels which shall have been taken . . . shall likewise be restored." See also Art. VIII (stating that the British may remove their belongings in "vessels"); Art. XIX (same). Further, the treaty also specifically catalogues items other than territory intended to be conveyed. For instance the treaty transfers control of "factories," Art. XI, "artillery," Art. XII, "fortresses," Art. XIX, "castles," Art. XXI, and "papers, letters, documents, and archives," Art. XXII. When the parties to the 1763 Treaty intended to cede non-territorial state property, they did so with great particularity. Yet nowhere does the treaty specifically mention the cession of "shipwrecks." "Express" is defined as "firmly and explicitly stated; particular, specific." Webster's II New College Dictionary 396 (1999). Without any mention of shipwrecks or any seagoing vessels it is hard to read Article XX as an express abandonment of LA GALGA.

Second, the cession of state property in Article XX is limited to all that Spain possesses "on the continent of North America." The plain meaning of this is that Spain ceded to Great Britain only what was located on land. Spain did not cede possessions in the sea or seabed. The district court focused on the fact that the "clause is a sweeping grant of territory and property," yet overlooked the "on the continent" limitation. This limitation excludes wrecks like LA GALGA that were located not on the continent, but in the seabed.

Sea Hunt and the Commonwealth urge that "on the continent" included coastal waters, and that consequently the 1763 Treaty constitutes an express abandonment of LA GALGA. Yet in a similar provision of the treaty, the parties specifically cede both land and the coasts. Article IV cedes French Canada to Great Britain and specifically provides for cession of "in general every thing that depends on the said countries, lands, islands, and coasts" (emphasis added). It also transfers all rights held "over the said countries, lands, islands, places, coasts, and their inhabitants" (emphasis added). By contrast, Article XX states that Spain cedes to Great Britain "in general, every thing that depends on the said countries and lands," and all rights "over the said countries, lands, places, and their inhabitants." There is no mention at all of coasts in Article XX.

Moreover, in light of eighteenth century understandings, this "on the continent" language would hardly amount to clear and convincing evidence of an express abandonment of property in coastal waters. In fact, the three-mile coastal belt, well-recognized today, had no clear counterpart in eighteenth century international law. Ownership of the

three-mile belt in the eighteenth century was but a "nebulous suggestion." United States v. California, 332 U.S. at 32, 67 S.Ct. 1658. When "in 1776 the American colonies achieved independence and when in 1783 the Treaty of Paris was concluded, neither the British crown nor the colonies individually had any right of ownership of the seabed of the sea adjacent to the American coast." Report of Special Master Maris, O.T. 1973, No. 35 Orig. at 47, adopted by United States v. Maine, 420 U.S. 515, 95 S.Ct. 1155, 43 L.Ed.2d 363 (1975). Sovereign rights to the territorial sea were not established in international law until some time in the nineteenth century. See California, 322 U.S. at 33, 64 S.Ct. 899; accord Maine, 420 U.S. at 524, 95 S.Ct. 1155. Nineteenth century and present-day views of territorial cession are hardly dispositive of what mid-eighteenth century treaty signatories intended. See Shively v. Bowlby, 152 U.S. 1, 57, 14 S.Ct. 548, 38 L.Ed. 331 (1894); United States v. Angcog, 190 F.Supp. 696, 698 (D.Guam 1961).

Third, Article XX provides that Spain ceded "every thing that depends on the said countries and lands." The district court found that this included the wreck of LA GALGA. See Sea Hunt, 47 F.Supp.2d at 689. It is anything but clear, however, given eighteenth century understandings, that "every thing that depends" can be interpreted to include this shipwreck. When interpreting this same clause of Article XX, Chief Justice Marshall noted, "By the 20th article of the [1763] treaty, Spain ceded Florida, with its dependencies, and all the country she claimed east or southeast of the Mississippi, to Great Britain." Johnson and Graham's Lessee v. McIntosh, 21 U.S. (8 Wheat.) 543, 584, 5 L.Ed. 681 (1823) (emphasis added). At the time, "dependencies" meant other

territories that were dependent upon the sovereign country. A dependency was "a territory distinct from the country in which the supreme sovereign power resides, but belonging rightfully to it, and subject to the laws and regulations which the sovereign may think proper to prescribe." United States v. The Nancy, 27 F. Cas. 69, 71 (C.C.D.Pa.1814) (No. 15,854); see also Webster's II 303 (defining "dependency" as a "territory or state under the jurisdiction of another country from which it is separated geographically"). Under the Supreme Court's relatively contemporaneous interpretation, "every thing that depends" does not include Spanish property such as the shipwrecks, but rather refers to "dependencies" such as nearby islands.

Fourth, Article XX provides that "his Catholick Majesty shall have power to cause all the effects that may belong to him, to be brought away, whether it be artillery or other things." There is no deadline for the right to take this property away. Rather the right is guaranteed irrespective of the time elapsed. By contrast, other provisions of the Treaty specifically set time limits for certain actions. For instance, Article XX itself states that Spanish subjects may "bring away their effects, as well as their persons . . . the term limited for this emigration being fixed to the space of eighteen months." See also Art. VIII (providing four months for the demolition of fortresses); Art. XIII (eighteen months for the emigration of British subjects from Guadaloupe); Art. XXIV (providing different time periods for various "restitutions" and "evacuations"). His "Catholick Majesty," however, has no limitation whatsoever on the removal of state property. In treaty interpretation as in statutory interpretation, particular provisions may not be divorced from

the document as a whole. See Kolovrat v. Oregon, 366 U.S. 187, 195-96, 81 S.Ct. 922, 6 L.Ed.2d 218 (1961) (refusing to interpret a treaty provision in isolation). Where such specific time limits were included for a variety of different actions but not included for the clause at issue here, there is a strong presumption that no time limit applies.

In sum, Article XX does not contain "clear and convincing" evidence of express abandonment. While the language of Article XX encompasses a great deal of land and property, it does not mention vessels or shipwrecks, nor does Article XX refer to Spanish property in the sea or on the seabed. Such general treaty language does not come close to an "express declaration abandoning title," Columbus-America, 974 F.2d at 464, and therefore cannot amount to clear and convincing evidence of an express abandonment.

B.

This view of the treaty is not ours alone. Both parties to Article XX of the 1763 Treaty agree that the Kingdom of Spain did not abandon LA GALGA. Such agreement is significant. When "the parties to a treaty both agree as to the meaning of a treaty provision . . . we must, absent extraordinarily strong contrary evidence, defer to that interpretation." Sumitomo Shoji, 457 U.S. at 185, 102 S.Ct. 2374; see also El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 167, 119 S.Ct. 662, 142 L.Ed.2d 576 (1999) (the terms of a treaty must be given a "meaning consistent with the shared expectations of the contracting parties" (internal quotation marks omitted)). "Treaties are contracts between sovereigns, and as such, should be construed to give

effect to the intent of the signatories." Tabion v. Mufti, 73 F.3d 535, 537 (4th Cir.1996). Postratification understandings of the contracting parties are traditionally considered as aids to treaty interpretation. See El Al Israel Airlines, 525 U.S. at 167, 119 S.Ct. 662.

After the district court issued its judgment, the United Kingdom issued a formal Diplomatic Note clarifying that Article XX of the 1763 Treaty "cannot be interpreted as involving an express abandonment by Spain of its rights to the shipwreck of 'LA GALGA.' . . . [T]he intention behind Article XX was to transfer sovereignty over the territories mentioned in that Article, and not to deal with, or otherwise affect, the quite separate issue of the ownership of shipwrecks on the waters adjacent to these or other territories in North America." Spain also issued a Diplomatic Note reaffirming its view that the 1763 Treaty "was not a cession or abandonment of H.M. Frigate 'LA GALGA' or other shipwrecked vessels of Spain." "While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight." Kolovrat, 366 U.S. at 194, 81 S.Ct. 922. We decline to disregard the position of the relevant treaty signatories that Article XX was not intended to include movable property located in coastal waters. Given that their view accords with the language and structure of the Treaty itself, it can hardly be contended that Sea Hunt has put forward "extraordinarily strong contrary evidence," to rebut the parties' interpretation.

Appendix C

C.

Although we believe the standard of express abandonment controls in the circumstances of this case, it would be difficult under any test to conclude that LA GALGA was abandoned. The mere passage of time since a shipwreck is not enough to constitute abandonment. See Columbus-America, 974 F.2d at 461; Fairport, 177 F.3d at 499 (length of time "one factor among several relevant to whether a court may infer abandonment"). Spain attempted salvage after LA GALGA sank, maintained LA GALGA on its naval registry, and asserted a claim after Sea Hunt brought its admiralty action. Moreover, the shipwreck lies scattered and buried in the sand beneath the water, and technology has only recently become available for its salvage. See Yukon Recovery, L.L.C. v. Certain Abandoned Property, 205 F.3d 1189, 1194 (9th Cir.2000) ("[L]ack of technology is one factor to consider in determining whether inaction constitutes abandonment."). In other cases where abandonment was found for Spanish wrecks, Spain made no claim of ownership. See Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel, 569 F.2d 330, 337 (5th Cir.1978) (noting that "[t]he modern day government of Spain has expressed no interest in filing a claim in this litigation as a successor owner"); Lathrop v. Unidentified, Wrecked & Abandoned Vessel, 817 F.Supp. 953, 956 (M.D.Fla.1993) (finding that "no one . . . asserted an interest in the alleged vessel"). By contrast, Spain has vigorously asserted its interest in the wreck of LA GALGA and wishes to maintain it as a sacred military gravesite. In light of these circumstances, even a finding of implied abandonment would be improper.

Appendix C

D.

The United States has strenuously defended Spain's ownership over these vessels. The government maintains that this is required by our obligations under the 1902 Treaty as well as general principles of international comity. The United States "is the owner of military vessels, thousands of which have been lost at sea, along with their crews. In supporting Spain, the United States seeks to insure that its sunken vessels and lost crews are treated as sovereign ships and honored graves, and are not subject to exploration, or exploitation, by private parties seeking treasures of the sea." Amicus Curiae Br. of U.S. at 1. Protection of the sacred sites of other nations thus assists in preventing the disturbance and exploitation of our own. Here the government's interest is rooted in customary international law. See 8 Digest of U.S. Practice in International Law 999, 1006 (1980) (noting that interference with sunken military vessels, "especially those with deceased individuals," is "improper" and that foreign governments' requests to have such views respected "should be honored").

It bears repeating that matters as sensitive as these implicate important interests of the executive branch. Courts cannot just turn over the sovereign shipwrecks of other nations to commercial salvors where negotiated treaties show no sign of an abandonment, and where the nations involved all agree that title to the shipwrecks remains with the original owner. Far from abandoning these shipwrecks, Spain has vigorously asserted its ownership rights in this proceeding. Nothing in the law of admiralty suggests that Spain has abandoned its dead by respecting their final resting place at sea.

Appendix C

IV.

We reverse the judgment of the district court that the Kingdom of Spain abandoned the vessel LA GALGA. We affirm the judgment of the district court as to JUNO. Both vessels remain the property of Spain.[2] The judgment of the district court is accordingly

AFFIRMED IN PART AND REVERSED IN PART.

---

2. We affirm the district court's denial of a salvage award to Sea Hunt. The district court found, "It is the right of the owner of any vessel to refuse unwanted salvage. Sea Hunt knew before bringing this action that the JUNO was a Spanish ship and that Spain might make a claim of ownership and decline salvage . . . . Because Sea Hunt had prior knowledge of Spain's ownership interests and had reason to expect Spain's ownership claim and refusal to agree to salvage activity on JUNO, Sea Hunt can not be entitled to any salvage award."